92-1

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LYNWOOD MOREAU, *et al.*,
Petitioners,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL T. LEIBIG
(Counsel of Record)
INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, General Counsel
ZWERDLING, PAUL, LEIBIG, KAHN, THOMPSON & DRIESEN, P.C.
1025 Connecticut Avenue, N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000
Counsel for Lynwood Moreau and all other Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-2833

LYNWOOD MOREAU, Individually, as President of the Harris County Deputy Sheriff's Union, Local 154, IUPA, AFL-CIO, and as FLSA Representative of 37 Similarly Situated consenting Harris County Law Enforcement Officers, *et al.*,

Plaintiffs-Appellants,

v.

JOHNNY KLEVENHAGEN, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

March 31, 1992

Before WILLIAMS, WIENER, Circuit Judges, and LITTLE, District Judge*.

WIENER, Circuit Judge:

A deputy sheriffs' union appeals the district court's grant of summary judgment in favor of Harris County, Texas on all three of the union's claims under the Fair Labor Standards Act (FLSA). We affirm the grant of summary judgment on two of those claims. But finding that the union was misled by the district court's bifurcation of the case and was thereby prevented from present-

---

* District Judge of the Western District of Louisiana, sitting by designation.

ing adequate summary judgment proof on the third claim, we reverse and remand to the district court for further proceedings with respect to that claim.

I.

FACTS

On April 15, 1988, Eugene T. Merritt, Jr. brought suit individually and as President of the Harris County Deputy Sheriffs Union[1] (the Union), together with approximately 400 other Harris County Deputy Sheriffs, against Harris County and Sheriff Johnny Klevenhagen (collectively, the "County"). The complaint alleged that the County violated the FLSA by (1) failing to pay cash in lieu of compensatory time for overtime work in the absence of an agreement with the plaintiffs' designated representative (the comp time claim); (2) failing to include longevity pay in the plaintiffs' "regular rate of pay" for overtime payment calculations (the longevity claim); and (3) excluding non-mandated firearms qualification time from the calculation of number of hours worked (the firearms qualification claim). The district court denied the Union's motion for partial summary judgment and granted summary judgment in favor of the County on all three claims.

II.

ANALYSIS

A. *The Comp Time Claim.*

Under the Harris County pay system, deputy sheriff's receive compensatory time as overtime compensation at 1½ times the normal rate of pay. When a deputy's bank of comp time reaches 240 hours, the deputy receives compensation in cash for overtime at the hourly rate, based

[1] At the time of appeal, Lynwood Moreau served as president of the Union.

on the deputy's "base pay rate." Each of the deputies in this action designated the Union as his or her representative. The County instituted its pay system without an agreement with the Union.

The Union's claim alleges that the County's pay system violates Section 7(*o*) of FLSA, which provides in part:

> (2) A public agency may provide compensatory time under paragraph (1) only—
>
> (A) Pursuant to—
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of such employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of work . . . .
>
> • • • •
>
> (B)
>
> • • • •
>
> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii).[2]

The County's current pay system was the "regular practice in effect" on April 15, 1986. Each deputy signed a payroll compensation form that stated that the deputy understood and accepted the County's personnel regulations, which set forth the terms of the pay system.

[2] 29 U.S.C. § 207(*o*).

The Union asserts that as the deputies in this case have designated the Union as their representative, under Section 207(*o*)(2)(A)(i) the County has no authority to pay deputies for overtime in comp time, even if the deputies elect to be paid in comp time, unless the County has entered into an agreement with the Union to that effect. The Union relies on the Tenth Circuit's decision in *International Ass'n of Fire Fighters, Local 2203 v. West Adams County Fire Protection Dist.*[3] In that case, the Tenth Circuit analyzed the Department of Labor regulations interpreting Section 207(*o*) and held that "(1) if employees have a representative, an employer may pay comp time in lieu of cash only pursuant to an agreement between the employer and the representative, and (2) employees are deemed to have a representative by merely designating a representative, whether or not the employer recognizes the representative. The Union argues that under *West Adams*, as the deputies had designated the Union as their representative, the County could not pay comp time in the absence of an agreement with the Union.

We find the Union's argument unpersuasive. TEX. REV.CIV.STAT.ANN. art. 5154c prohibits any political subdivision from entering into a collective bargaining agreement with a labor organization unless the political subdivision has adopted the Fire and Police Employee Relations Act. Harris County has not adopted that Act; thus, under article 5154c the County has no authority to bargain with the Union. In light of that Texas statute, it is not *West Adams* but two other circuit court decisions, one from the Fourth Circuit[4] and another from the Eleventh Circuit,[5] that are instructional in the disposition of this case.

---

[3] 877 F.2d 814 (10th Cir.1989).

[4] *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir.1989), *cert. denied*, 493 U.S. 1051, 110 S.Ct. 854, 107 L.Ed.2d 848 (1990).

[5] *Dillard v. Harris*, 885 F.2d 1549 (11th Cir.1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 210, 112 L.Ed.2d 170 (1990).

In *Abbott v. City of Virginia Beach*,[6] the Fourth Circuit held that neither FLSA nor the regulations implementing it showed any intent to preempt state laws prohibiting cities from entering into collective bargaining agreements.[7] As Virginia law had such a prohibition, and as the pay system in Virginia Beach gave individual police officers an absolute choice of receiving either comp time or cash for overtime work, the Fourth Circuit held that the pay system, which was not the result of an agreement between the city and the officers' designated representative, did not violate FLSA.[8]

In *Dillard v. Harris*,[9] the Eleventh Circuit agreed with the analysis in *Abbott* and went on to discuss an alternative approach that led to the same result. In *Dillard*, as in *Abbott* and the instant case, (1) the employees had designated a representative, (2) state law prohibited the city from entering into a collective bargaining agreement, and (3) the city, without an agreement with the employees' representative, had established a pay system providing for comp time. The city employees argued that, as they had designated a representative, the city could not pay them in comp time in the absence of an agreement with their representative. The *Dillard* court held that under the plain language of Section 207(*o*)(2)(A), the prerequisite for coverage under subclause (i) was the existence of an *agreement* between the city and the representative, rather than the existence of the *representative*.[10] Thus, held the court, even though the employees had designated a representative, subclause (ii) rather than subclause (i) applied because there was no agreement between the city and the representative under sub-

---

[6] Note 4, *supra*.

[7] *Id.* at 136.

[8] *Id.* at 137.

[9] Note 5, *supra*.

[10] *Id.* at 1552-54.

clause (i).[11] The court held that as the employees were hired before April 15, 1986, and as the city's practice before that date was to give comp time in lieu of cash, that practice constituted an agreement under subclause (ii), and was permissible under Section 207(o)(2)(B).[12]

Joining our colleagues of the Fourth and Eleventh Circuits, we hold that, because Texas law prohibits the County from entering into a collective bargaining agreement with the Union—and thus there is no such agreement—the deputies are not covered by subclause (i) of Section 207(o)(2)(A). Rather, subclause (ii) of that section applies. Under Section 207(o)(2)(B), the County's pay system, which was in effect on April 15, 1986, constituted an agreement between the County and deputies hired prior to that date. For deputies hired after April 15, 1986, the individual compensation form signed by each deputy constituted individual agreements of the type contemplated by Section 207(o)(2)(A)(ii). Thus, the County has complied with Section 207(o) and the payment of comp time in lieu of cash is proper.

Nevertheless, the Union argues that, even in light of the Texas law that prohibits political subdivisions from entering into collective bargaining agreements, the County was still required to enter into an agreement with the Union before it could pay deputies in comp time. The Union contends that under Section 207(o) comp time may be authorized pursuant to agreements that are not classified as collective bargaining agreements, thus not violating Texas law. Section 207(o)(2)(A)(i) provides that a public agency may provide comp time pursuant to:

> [A]pplicable provisions of a collective bargaining agreement, *memorandum of understanding, or any other agreement between the public agency and representatives of such employees* (emphasis added).

[11] *Id.* at 1552-53.

[12] *Id.* at 1553.

The Union asserts that it represents the deputies in a non-collective bargaining capacity and that any agreement between the Union and the County would be classified as "any other agreement" under Section 207(o), not in violation of Texas law. The Union also cites TEX.REV. CIV.STAT.ANN., art 5154c Section 6, which recognizes the right of public employees to present grievances through a "representative" such as the Union, and argues that under that statute, the Union is allowed to deal with the County in a non-collective bargaining capacity.

We reject this argument. Presentation of grievances is acceptable under Texas law because it is a unilateral procedure under which the employee can be represented by anyone he or she chooses, be it a lawyer, clergyman, union or some other person or organization. Texas law prohibits any bilateral agreement between a city and a bargaining agent, whether the agreement is labeled a collective bargaining agreement or something else. Under Texas law, the County could not enter into *any* agreement with the Union.

B. *The Longevity Claim.*

The County pays its deputy sheriffs "longevity pay" each year. Those payments are calculated by multiplying a fixed dollar amount, which the County Commissioners Court determines annually, by the number of years an individual employee has been employed by the County. That total is paid to the employee in monthly installments throughout the year.

The "regular rate of pay" is the rate which is multiplied by one and one-half to arrive at the rate of overtime pay pursuant to Section 7(a) of FLSA.[13] The County does not include longevity pay in its determination of the "regular rate of pay" for purposes of calculating the rate of overtime pay. The Union contends that

[13] 29 U.S.C. § 207(a).

this violates FLSA. Section 7(e) of FLSA provides in part:

> (e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—
>
> > (1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a *reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency* (emphasis added).[14]

The regulation interpreting Section 207(e) provides that if a payment "is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift."[15] The district court concluded that the longevity payments were not geared to wages, efficiency or production and held that they were a "reward for service." Thus, held the court, the payments qualified as "sums paid as gifts" under Section 207(e)(1) and were properly excluded from the determination of "regular rate of pay."

The Union cites three administrative letter rulings by the Department of Labor for its argument that longevity payments must be included in "regular rate of pay" for purposes of calculating overtime pay. Those letters are easily distinguishable, however. One letter concerns incentive payments made to employees following the completion of educational or career development programs and is clearly not applicable to the instant case. The other two letters state that longevity payments made

[14] 29 U.S.C. § 207(e).

[15] 29 C.F.R. § 778.212 (1989).

pursuant to a city ordinance or a collective bargaining agreement between the employer and employees must be included in "regular rate of pay." In the instant case, no such ordinance or bargaining agreement binds the County to make longevity payments.

The deputies receive the longevity payments regardless of the number of hours worked or wages earned. The payments serve no purpose other than to reward the deputies for their tenure as County employees. The Union cites no authority in support of its argument other than the administrative letter rulings which we have distinguished. As the payments are not measured by or dependent on hours worked, production or efficiency, we hold that the longevity payments qualify as "sums paid as gifts." As such, the County properly excludes the longevity payments from "regular rate of pay."

C. *The Firearms Qualification Claim.*

The Union's complaint alleged that the County wrongfully excluded certain time spent in firearms qualification from the calculation of the number of hours worked by the deputy sheriffs—thereby depriving deputies of compensation for that time. Texas law requires law enforcement officers to meet firearms proficiency qualifications once each year. The Union and the County agree that *training* time spent to meet that qualification, as well as time spent training for requalification—as distinguished from time spent in a second actual qualification—is not compensable under FLSA, even if such time exceeds a deputy's normal working hours. From 1986 until August 1991, however, the County required its law enforcement officers to meet the proficiency qualifications twice each year.[16] The Union argues that, as the second qualification requirement each year exceeded the state requirement of one qualification per year, any overtime spent by the dputies in qualifying a second time during each of those years was compensable.

[16] The County now requires its officers to qualify only once each year.

Job-related training activities are generally compensable under FLSA,[17] but the FLSA regulations provide that required training is not compensable in the following situations:

> (1) Attendance outside of regular working hours at specialized or follow-up training, which is *required by law* for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.
>
> (2) Attendance outside of regular working hours at specialized or follow-up training, which is *required* for certification of employees of a governmental jurisdiction *by law of a higher level of government (e.g., where a State or county law* imposes a training obligation on city employees), does not constitute compensable hours of work.[18]

The Union argues that, although overtime related to the first qualification during a year is excluded from compensability pursuant to the regulations, as the second qualification during a year is required by county policy only—not by state or county law—any overtime spent meeting the second qualification requirement is not an exception to the general rule of compensability.

Central to our determination here is the fact that the district court bifurcated this case into two stages—the first stage was supposed to address only liability and the second stage was supposed to address damages. The Union argues that, despite the bifurcation, the district court's holding in fact addressed the issue of damages during the first, or liability stage, at a time when the parties had not yet conducted discovery. The Union asserts that the sole purpose of the liability stage of the proceedings was to determine whether in fact the County maintained a policy of not compensating deputies for any overtime spent training to meet either of the semi-annual qualification requirements and, if so, whether implementation of that policy would violate the overtime provision of FLSA. Thus, the Union contends, it should not have been required in the liability stage to produce proof that any deputies had actually trained twice without being compensated for overtime on either occasion, and the district court erred in ruling on the damages stage before the Union had an opportunity to present summary judgment proof on that issue. The Union urges that, inasmuch as the twice-a-year qualification policy, if applied, would entitle deputies to overtime, we should remand this case to the district court with instructions to allow the Union to adduce its evidence of actual damages suffered, on a deputy by deputy basis, whether by summary judgment proof, in an evidentiary hearing, or in a full-blown trial. We agree.

[17] 29 C.F.R. 785.27 (1989).

[18] 29 C.F.R. 553.226(b) (1989) (emphasis added).

In our *de novo* review of this case, we hold that the district court erred in two respects. First, the district court erred in its determination of the factual circumstances under which a deputy would be entitled to overtime compensation. The district court stated that if a deputy met the State-required annual qualification but failed to meet the County's semi-annual qualification requirements within the same year, and as a result that deputy was required to participate in remedial training which caused him to work more than forty hours during a week, the deputy would be entitled to overtime compensation. The district court held that the Union's claim did not survive the County's motion for summary judgment, however, because the Union had failed to demonstrate by summary judgment proof that one or more of the deputies had not in fact been compensated in such a situation.

In the situation discussed by the district court, an officer who twice tries but fails even once to meet the certification requirements must make additional attempts until he or she succeeds. But the Union concedes that time spent by an officer in training for such "make-up" qualification tests is not compensable overtime under FLSA because the County allows participation in such remedial activities to take place during normal working hours. The situation actually being contested, though, is different. It questions overtime entitlement of a deputy who *passes* his shooting test twice a year on his own time without being paid overtime for either event. Thus, contrary to the district court's conclusion, deputies are claiming entitlement to overtime compensation *only* if they spend time in excess of normal working hours to meet the requirements for the second shooting qualification during a year after having already worked on their own time to meet the requirement once that year.

The district court's second error was in granting summary judgment in favor of the County on the firearms qualification issue. A memorandum dated February 16, 1987 from Sheriff Klevenhagen to all Sheriff's Office personnel provided:

> Firearms requalification for peace officers is required by the State of Texas as a condition of maintaining the Peace Officer License. A thorough search of applicable law by the office of the County Attorney has determined that under this condition the time spent in demonstrating firearms proficiency is not compensable time when occurring outside normal duty hours. *Therefore, effective immediately, no overtime compensation will be granted for time spent on firearms requalification* (emphasis added).

That summary judgment proof clearly showed that the County did in fact have a policy under which deputies would receive no compensation for any overtime spent meeting either of the semi-annual qualification requirements. Whether any deputies were actually deprived of overtime compensation because of the County's firearm qualification policy should have been addressed only at the damages stage of the proceedings. Thus, the district court "jumped the gun" when it granted summary judgment in favor of the County before the Union had an opportunity to conduct discovery and present proof of damages.

We therefore reverse the district court's grant of summary judgment on this issue and remand for further proceedings. As we have concluded that the County had a policy which potentially could deprive deputies of their just compensation, the Union must be allowed to discover and present proof, if there be any, of which deputies suffered damages as a result of that policy, and to what extent. To establish that its members actually incurred damages, the Union must show that one or more deputies (1) trained on their own time to meet *both* semi-annual qualification requirements during a year, and (2) received no overtime compensation for either occasion. Obviously, each deputy will be limited to recovery of overtime for only one such qualification per year because the other is required by state law and therefore is not compensable.

III.

CONCLUSION

As Texas law prohibits the County from entering into an agreement with the Union, the County's pay system constitutes an agreement between the County and the individual deputies in compliance with Section 7(*o*) of FLSA. Therefore, the district court did not err in granting summary judgment in favor of the County on the Union's comp time claim. Neither did the district court err in granting summary judgment in favor of the County on the Union's longevity payments claim because the payments were not measured by or dependent on hours

worked, production or efficiency but qualified as gifts. The district court did err, however, in granting summary judgment in favor of the County on the Union's firearms qualification claim. We therefore REVERSE the district court's grant of summary judgment in favor of the County on that claim and REMAND to the district court for the sole purpose of determining whether any deputies suffered damages and, if so, to what extent. In all other respects, we AFFIRM the judgment of the district court.

APPENDIX B

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CA-H-88-1298

EUGENE T. MERRITT, JR., *et al.*,
Plaintiffs,

vs.

JOHNNY KLEVENHAGEN, *et al.*,
Defendants.

MEMORANDUM AND ORDER

[Entered Sep. 5, 1990]

Pending before the Court is Plaintiffs' motion for partial summary judgment on the issues of Defendants' use of compensatory time in lieu of cash payment for overtime, the exclusion of longevity pay from calculation of employees' "base pay", and Defendants' refusal to include certain training time as hours worked. Also pending is Defendants' motion for summary judgment.

Plaintiffs' contend that Defendants are violating section 207(o) of the Fair Labor Standards Act (FLSA) by awarding employees compensatory time off rather than cash payment for overtime. 29 U.S.C. § 207(o). Plaintiffs' second claim is that the calculation of their "base pay" rate illegally excludes the employees longevity pay. The "base pay" calculation is used to determine the overtime compensation due to employees. Thirdly, Plaintiffs claim that Defendants wrongfully exclude certain firearms training from the calculation of hours worked.

SUMMARY JUDGMENT

Summary judgment is authorized if the movant establishes that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Rule 56 mandates entry of summary judgment against a party who, after adequate discovery, fails to establish the existence of every element of his case for which he has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). To avoid suffering a summary judgment, the nonmoving party must raise a fact issue by depositions, answers to interrogatories, affidavits or judicial admissions. *Id.*

USE OF COMPENSATORY TIME

Plaintiffs Harris County Deputy Sheriff's Union, Local 154, AFL-CIO (Local 154) and individual deputies sheriff (individual plaintiffs) contend that the Defendants Sheriff Johnny Klevenhagen and Harris County are violating the compensatory time provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(o). The relevant portion of the statute provides as follows:

> (2) A public agency may provide compensatory time under paragraph (1) only—
>
> (A) pursuant to—
>
> (i) applicable provisions of a collective bargaining agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

> (B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).
>
> In the case of employees described in clause A(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause A(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

Id.

It is undisputed that Defendants had a "regular practice in effect on April 15, 1986" that provided that overtime be compensated through compensatory time off. For employees hired after April 15, 1986, the Harris County Personnel Regulations and the individual employee compensation form (which incorporate by reference the Personnel Regulations) signed by the individual Plaintiffs, constitute an agreement between employer and employee of the type contemplated by section 207(o)(2)(A)(ii).

The principal area of disagreement in this case is whether subclause (i) or subclause (ii) is applicable. That answer turns on the meaning attached to the phrase "not covered by subclause (i)" found in subclause (ii). Plaintiffs contend that the phrase means subclause (ii) applies only to employees who have no representative. Defendants' contend that the phrase means subclause (ii) applies whenever no agreement exists irrespective of the existence of an employees' representative.

This issue has been addressed in three Courts of Appeals decisions. Plaintiffs rely on *Local 2203 v. West Adams County Fire Protection District*, which held that "The employees' designation, rather than the employer's

recognition, of a representative is the event which triggers the application of section 207(o)(2)(A)(i), thereby precluding the use of . . . a regular practice." *Local 2203 v. West Adams County Fire Protection District*, 877 F.2d 814, 820 (10th Cir. 1989). In *West Adams*, the court found the controlling language of the statute was ambiguous and resorted to the legislative history of the FLSA and 29 C.F.R. 553.23 to resolve the ambiguity. Plaintiffs urge the Court to follow the *West Adams* rationale which requires, upon employee designation of a representative, that the employers either come to an agreement with the employees' representatives or pay cash remuneration for overtime.

Defendants assert that state law prohibits their bargaining with employees' representatives in the area of compensation. Absent the adoption of the Fire and Police Employee Relations Act by the voters of the political subdivision involved, Texas statutes prohibit public employers from collective bargaining with any labor organization. Tex. Rev. Civ. Stat. Ann. art. 5154c and 5154c-1 (Vernon 1987). Counties and deputies sheriff are included in and covered by these articles. *Commissioners' Court of El Paso County v. El Paso County Sheriff's Deputies Ass'n.*, 620 S.W.2d 900 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.). The term "collective bargaining" as applied by the National Labor Relations Act means ". . . [T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement. . .". 29 U.S.C.A. § 158(d). *See* also *N.L.R.B. v. Boss Mfg. Co.*, 118 F.2d 187, 189 (7th Cir 1941). Plaintiff Local 154's attempt to reach an agreement with Defendants was an attempt at collective bargaining and is prohibited by Texas Law.

In *Abbott v. City of Virginia Beach*, the Fourth Circuit Court of Appeals considered the application of sec-

tion 207(o) where state law prohibited collective bargaining between policemen's representatives and the city. *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989). The court quoted 29 C.F.R. 553.23(b)(1) which declares the representative of a employee is deemed to have been effectively appointed if he had been designated by the employee, irrespective of his being recognized by the employer. The court then addressed the application of state law. The court first noted that several commentators had expressed concern that section 553.23(b)(1) would conflict with state law and then quoted the Secretary of Labor as follows:

> . . . Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices.

Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed.Reg. 2012, 2014-15 (1987).

The court concluded that section 207(o) allows ". . . public employers to enter into individual overtime compensation agreements with individual employees where state law prohibits the agency from entering into agreements with employee representatives." *Abbott*, 879 F.2d at 135.

Texas statutes forbid the collective bargaining attempted by Local 154. Art. 5154c. Where state law prohibits an employer from entering into a collective bargaining agreement, section 207(o) allows individual compensation agreements. *Abbott*, 879 F.2d 132. Defendants had a regular practice in effect on April 15, 1986 with respect to compensatory time off which constitutes, via

section 207(o)(2)(A)(ii), an agreement with employees hired prior to April 15, 1986. Employees hired after April 15, 1986 are parties to individual agreements. Consequently, the Defendants are in compliance with FLSA section 207(o).

The Eleventh Circuit Court of Appeals has also addressed this issue. In *Dillard v. Harris*, the court adopted the *Abbott* rationale and decision thereby rejecting the *West Adams* opinion of the Tenth Circuit Court of Appeals. *Dillard v. Haris*, 885 F.2d 1549 (11th Cir. 1989). *Abbott*, 879 F.2d 132, *West Adams*, 877 F.2d 814. In *Dillard*, the plaintiff took the position that they had a representative and since no agreement between the representative and the employer existed, the law required cash payment for overtime. The employer's position was that the law prohibited an agreement, and the lack of an agreement triggered the alternative clause wherein employer-employee individual agreements controlled the choice of remuneration. The court proffered an alternative analysis to the *Abbott* decision based on the contention that the statute was not ambiguous, and that absent a contrary mandate within the legislative history, no other interpretation would be allowed. The court then discussed whether a representative pursuant to section 207(o)(2)(A)(i) must be "merely designated" or recognized. In reviewing the legislative history, the court found a discrepancy between the House of Representatives and the Senate versions of the bill. The House version supported the "merely designated" interpretation and the Senate version supported the "recognized" representative requirement. After noting that controlling weight should be given to the intent of the originating legislative body and that the bill originated in the Senate, the court adopted the "recognized" representative requirement position. The court then stated that even if controlling weight were placed on the existence of a representative rather than the existence of an agreement, subclause (ii) would still attach because the state law prohibited the representative from being "recognized". *Dillard*, 885 F.2d at 1554.

Even if Plaintiffs' attempt to distinguish (by contending that Texas Law does not conclusively prohibit collective bargaining) the case at bar from *Abbott* were successful, Local 154 could not be a "recognized" representative because the voter adoption requirements of article 5154c-1 have not been met. Therefore, subclause (ii) would control and the "regular practice" provision as individual agreement would allow compensatory time in lieu of cash payment for overtime for employees hired prior to April 15, 1986. The individual agreements would do the same for later employees. Under either analysis, the Defendants are in compliance with FLSA section 207(o).

CALCULATION OF COMPENSATION

Harris County deputies sheriff receive cash overtime compensation at one and one-half times the individual's regular pay rate after the individual has accumulated 240 hours of compensatory time. Individual Plaintiffs receive additional longevity pay based on their years of service. That pay rate was $60.00, $70.00, and $75.00 per year of service for the years 1985, 1986 and 1987 respectively. This longevity pay is not dependent on the individual's hourly or monthly pay rate. Plaintiffs contend that this pay must be included in the regular pay rate for calculation of overtime compensation.

Plaintiffs rely on two opinion letters from the Department of Labor (DOL). The Supreme Court has evaluated the significance of such administrative rulings as follows:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a

> judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

With reference to these kinds of administrative rulings, the Fifth Circuit Court of Appeals has stated, "The force with which these least authoritative pronouncements are allowed to press on the Judicial scales, however, must vary with the circumstances of each case. *Pollock v. General Finance Corp.*, 552 F.2d 1142, 1144 (5th Cir. 1977).

The first DOL letter (Document 12, attachment 3) is inapposite because it advises that certain incentive pay that follows from completion of educational/career development programs must be included in overtime compensation calculation. The case at bar is distinguishable because longevity pay requires no performance from an employee above continued employment. The second letter (Document 23, attachment 3) applies to a situation which is also distinguishable from this case. The second letter advised that lump sum longevity pay for employees completing eight (8) years of service, paid pursuant to a contract or city ordinance, was to be included in overtime pay calculation. No such ordinance or contract is in evidence or alleged in this case. Furthermore, the opinion letter states that the expressed opinion is made "On the basis of the information available to us. . . ." This "information" is not revealed in the letter. The letter implies that the "information" was significant and the Court would be reluctant to attach precedential value without a clearer understanding of the factual situation surrounding the letter opinion. For these reasons, the Court finds the opinion letters to be of little significance to this case.

The FLSA states that the regular rate:

> . . . [S]hall not be deemed to include gifts; payments in the nature of gifts made at Christmas time or on other special occasions, *as a reward for service*, the amounts or which are not measured by or dependent on hours worked, production or efficiency;

29 U.S.C. § 207(d)(1) (emphasis added).

In interpreting this provision of the FLSA, the regulations state

> (b) . . . If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift . . .
>
> . . .
>
> (c) . . . A Christmas bonus paid (not pursuant to contract) in the amount of two weeks' salary to all employees and an equal additional amount for each 5 years of service with the firm, for example, would be excludable from the regular rate under this category.

29 C.F.R. § 778.212 (1989).

The longevity pay is an award for service and is not geared to wages, efficiency or production. The Court finds that the longevity pay is properly excluded from the overtime compensation calculation.

COMPENSATION FOR TRAINING TIME

Plaintiffs allege that Defendants wrongfully exclude "certain firearms training time from calculation of hours worked. (Document 1, paragraph 22). Defendants admit that they exclude from hours worked the time spent in firearms requalification and further assert that remedial firearms training is "in lieu of [an officer's] regular work assignment" for which attendants are paid straight time.

The State requires firearms proficiency qualifications annually. Both parties agree that training time spent to

meet this qualification is not compensable. Defendants, however, require firearms qualification *semi*annually. FLSA regulations generally require that job related training activities that are on premises during regular hours are compensable. 29 C.F.R. 785.27 (1989). The regulations permit exceptions for certain governmental employees such as deputies sheriff including: (1) attendance outside of regular working hours for specialized or follow-up training, and (2) attendance outside regular working hours for training required by a higher level of government.

It is possible that an individual Plaintiff may have successfully met his State required firearms qualification for the year and subsequently failed to meet the Defendants' *semi*annual requirements within the same calendar year. If that individual were then required to participate in remedial training, on premises, and during regular work hours during a workweek in which his worked time, including the time spent in remedial training, exceeded forty (40) hours, then he would be entitled to overtime compensation. However, to survive a motion for summary judgment, Plaintiffs must demonstrate by deposition, answers to interrogatories, admissions or affidavits that this specific fact has occurred. *Celotex*, 477 U.S. 317. Plaintiffs have failed to meet this burden.

Accordingly, the court

ORDERS that the Plaintiffs motion for partial summary judgment is DENIED and

ORDERS that the Defendants motion for summary judgment is GRANTED.

Signed in Houston, this 29th day of August, 1990.

/s/ James DeAnda
JAMES DEANDA
Chief Judge
Southern District of Texas

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-88-1298

EUGENE T. MERRITT, JR., *et al.*,
Plaintiffs,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Defendants.

FINAL JUDGMENT

[Entered Sep. 5, 1990]

In accordance with the memorandum opinion signed this day in the above-referenced proceeding, it is hereby

ORDERED

that Plaintiff's motion for partial summary judgment is DENIED and defendants motion for summary judgment is GRANTED and, accordingly, judgment is entered for defendants and all costs herein incurred are taxed to plaintiffs.

Signed this 29th day of August, 1990.

/s/ James DeAnda
JAMES DEANDA
Chief Judge
Southern District of Texas

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2833

D.C. Docket No. CA H 88 1298

LYNWOOD MOREAU, Individually as President of the Harris County Deputy Sheriff's Union, Local 154 IUPA, AFL-CIO, and as FLSA REPRESENTATIVE OF 37 Consenting Similarily Situated Consenting Harris County Law Enforcement Officers, *et al.*,
Plaintiffs-Appellants,

versus

JOHNNY KLEVENHAGEN, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before WILLIAMS, WIENER, Circuit Judges, and LITTLE [1], District Judge.

JUDGMENT

[Filed Mar. 31, 1992]

---

[1] District Judge of the Southern District of Texas, sitting by.

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court's grant of summary judgment in favor of the County on the Union's firearms qualification claim is reversed and remanded to the District Court for the sole purpose of determining whether any deputies suffered damages and, if so, to what extent; in all other respects, the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

March 31, 1992

Issued as Mandate: May 12, 1992

APPENDIX E

STATUTES AND REGULATIONS INVOLVED

29 U.S.C. § 207(o)(1)-(2)

§ 207. Maximum hours.

* * *

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in

lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

29 C.F.R. § 553.23

§ 553.23 Agreement of understanding prior to performance of work.

(a) *General.* (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7 (o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

(2) Agreements or understandings may provide that compensatory time off in lieu of overtime payment in cash may be restricted to certain hours of work only. In addition, agreements or understandings may provide for any combination of compensatory time off and overtime payment in cash (e.g., one hour compensatory time credit plus one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least "time and one-half" is maintained. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or understanding is in violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).

(b) *Agreement or understanding between the public agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

(2) Section 2(b) of the 1985 Amendments provides that a collective bargaining agreement in effect on April 15, 1986, which permits compensatory time off in lieu of overtime compensation, will remain in effect until the expiration date of the collective bargaining agreement unless otherwise modified. However, the terms and conditions of such agreement under which compensatory time off is provided after April 14, 1986, must not violate the requirements of section 7(o) of the Act and these regulations.

(c) *Agreement or understanding between the public agency and individual employees.* (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must, be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept. (See § 553.50.) An employer need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees. The agreement or understanding to provide compensatory time off in lieu of cash overtime compensation

may take the form of an express condition of employment, provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay. In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay. However, the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure.

(2) Section 2(a) of the 1985 Amendments provides that in the case of employees who have no representative and were employed prior to April 15, 1986, a public agency that has had a regular practice of awarding compensatory time off in lieu of overtime pay is deemed to have reached an agreement or understanding with these employees as of April 15, 1986. A public agency need not secure an agreement or understanding with each employee employed prior to that date. If, however, such a regular practice does not conform to the provisions of section 7(o) of the Act, it must be modified to do so with regard to practices after April 14, 1986. With respect to employees hired after April 14, 1986, the public employer who elects to use compensatory time must follow the guidelines on agreements discussed in paragraph (e)(1) of this section.

52 Fed. Reg. 2014-15 (January 16, 1987)

Section 7(o) Compensatory Time and Compensatory Time Off.

• • • •

Section 553.23 Agreement or understanding prior to performance of work.

The NLOC commented that language should be added to paragraph (a)(1) of this section to clarify that no agreement or understanding on compensatory time is required with respect to employees hired prior to April 15, 1986, if the public agency had a regular practice of granting compensatory time in lieu of overtime pay prior to that date. The Department agrees that clarifying language is needed. However, the statute provides that this exception only applies to employees not covered by ". . . a collective bargaining agreement (CBA), memorandum of understanding, or any other agreement between the public agency and representatives of such employees". Both the House and Senate reports also plainly state that the exception for a "prior practice" in lieu of an agreement or understanding was intended to be applicable only to employees who do not have a representative. (See H. Rep., p. 20 and Senate Report No. 99-159, p. 11 (hereinafter cited as S. Rep.).) Accordingly, paragraph (a)(1) of the regulations has been modified to add clarifying language.

• • • •

Various commenters, particularly representatives of cities, expressed concern with the statement in § 553.23 (b)(i), "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." Two commenters objected to this provision because they believed that it would require a collective bargaining obligation between a public employer and its employees, when no such bargaining obligation currently exists under State or Federal law.

They felt that in those jurisdictions where there is no requirement that employers meet and deal with employee representatives, employee organizations could attempt to establish a collective bargaining obligation via these regulations. They were also concerned that this subsection is not clear about the employer's obligation to "recognize" any representative, that conceivably an employer could find itself dealing with a different representative for each employee. They believed that § 553.23(b)(1) should operate only where collective bargaining obligations are provided for by State law.

A city government suggested that where employees are not represented by a collective bargaining agent, the agreement for compensatory time should be made only with the public agency's authorized representative.

Another commenter suggested that, since most cities and towns have not recognized a union or other employee association, subsection (b) be revised to clarify that the agency must only reach agreement with "recognized" units.

The State of Missouri expressed concern that where employee representatives have no auhtority to bargain enforceable agreements, the proposal accords greater legal status to employee representatives than is possible under State law. They suggest that "recognized representative" mean an organization designated by the employees under a State's comprehensive collective bargaining statute, but not to include organizations covered by "meet and confer" statutes.

The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA, memorandum of understanding or other agreement be reached between the public agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer

and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA Section 7(o) shall be determined in accordance with State or local law and practices.

In addition, to clarify the fact that the representative of the employees need not be a formal or recognized collective bargaining agent, the Department has modified § 553.23(c)(1), as suggested by the National Education Association (NEA), to add the words "or otherwise designated" between the words "recognized" and "representative" since collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative.

• • • •

APPENDIX F

99th Congress
1st Session

Report
99-331

HOUSE OF REPRESENTATIVES

FAIR LABOR STANDARDS AMENDMENTS OF 1985

October 24, 1985.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. HAWKINS, from the Committee on Education and Labor, submitted the following

REPORT

[To accompany H.R. 3530]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 3530) to amend the Fair Labor Standards Act of 1938 to authorize the provision of compensatory time in lieu of overtime compensation for employees of States, political subdivisions of States, and interstate governmental agencies, to clarify the application of the Act to volunteers, and for other purposes, having considered the same, report favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SHORT TITLE; REFERENCE TO ACT

SECTION 1. (a) SHORT TITLE.—This Act may be cited as the "Fair Labor Standards Amendments of 1985".

(b) REFERENCE TO ACT.—Whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be a reference to a section or other provision of the Fair Labor Standards Act of 1938.

COMPENSATORY TIME

SEC. 2. (a) COMPENSATORY TIME.—Section 7 (29 U.S.C. 207) is amended by adding at the end the following:

"(o) (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

"(2) A public agency may provide compensatory time under paragraph (1) only—

"(A) pursuant to—

"(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

"(ii) in the case of employees not covered by subclause (i), an agreement or understanding

arrived at between the employer and employee before the performance of the work; and

"(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(iii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

"(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 180 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 180 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

"(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

"(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused

compensatory time at a rate not less than the average regular rate received by such employee during the last 3 years of the employee's employment.

"(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

"(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

"(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

"(6) For purposes of this subsection—

"(A) the term 'overtime compensation' means the compensation required by subsection (a), and

"(B) the term 'compensatory time' and 'compensatory time off mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.".

(b) EXISTING COLLECTIVE BARGAINING AGREEMENTS.—A collective bargaining agreement which is in effect on April 15, 1936, and which permits compensatory time off in lieu of overtime compensation shall remain in effect until its expiration date unless otherwise modified, except that compensatory time shall be provided after April 14, 1986, in accordance with section 7(o) of the Fair Labor Standards Act of 1938 (as added by subsection (a)).

(c) LIABILITY AND DEFERRED PAYMENT.—(1) No State, political subdivision of a State, or interstate gov-

ernment agency shall be liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 7 or 11(c) (as it relates to section 7) of such Act occurring before April 15, 1986, with respect to any employee of the State, political subdivision, or agency who would not have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in sections 775.2 and 775.4 of title 29 of the Code of Federal Regulations.

(2) A State, political subdivision of a State, or interstate governmental agency may defer until August 1, 1986, the payment of monetary overtime compensation under section 7 of the Fair Labor Standards Act of 1938 for hours worked after April 4, 1986.

SPECIAL DETAILS, OCCASIONAL OR SPORADIC EMPLOYMENT, AND SUBSTITUTION

SEC. 3. (a) SPECIAL DETAIL WORK FOR FIRE PROTECTION AND LAW ENFORCEMENT EMPLOYEES.—Section 7 (29 U.S.C. 207) is amended by adding after subsection (o) (added by section 2) the following:

"(p)(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

"(A) requires that its employees engaged in fire protection, law enforcement, or security activities be

hired by a separate and independent employer to perform the special detail,

"(B) facilitates the employment of such employees by a separate and independent employer, or

"(C) otherwise affects the condition of employment of such employees by a separate and independent employer.".

(b) OCCASIONAL OR SPORADIC EMPLOYMENT.—Section 7(p) (29 U.S.C. 207), as added by subsection (a), is amended by adding at the end the following:

"(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.".

(c) SUBSTITUTION.—(1) Section 7(p) (29 U.S.C. 207), as amended by subsection (b), is amended by adding at the end the following:

"(3) If an individual who—

"(A) is employed by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, and

"(B) is employed in fire protection or law enforcement activities (including activities of security personnel in correctional institutions),

agrees, with the approval of the public agency and solely at the option of such individual, to substitute during

scheduled work hours for another individual who is employed by such agency in such activities, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section."

(2) Section 11(c) (29 U.S.C. 21(c)) is amended by adding at the end the following: "The employer of an employee who performs substitute work described in section 7(p)(3) may not be required under this subsection to keep a record of the hours of the substitute work.".

VOLUNTEERS

SEC. 4. (a) DEFINITION.—Section 3(e) (29 U.S.C. 203(e)) is amended—

(1) by striking out "paragraphs (2) and (3)" in paragraph (1) and inserting in lieu thereof "paragraphs (2), (3), and (4)", and

(2) by adding at the end the following:

"(4)(A) The term 'employee' does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

"(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunterred; and

"(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

"(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.".

(b) REGULATIONS.—Not later than March 15, 1986, the Secretary of Labor shall issue regulations to carry out paragraph (4) of section 3(e) (as amended by subsection (a) of this section).

(c) CURRENT PRACTICE.—If, before April 15, 1986, the practice of a public agency was to treat certain individuals as volunteers, such individuals shall until April 15, 1986, be considered, for purposes of the Fair Labor Standards Act of 1938, as volunteers and not as employees. No public agency which is a State, a political subdivision of a State, or an interstate governmental agency shall be liable for a violation of section 6 occurring before April 15, 1986, with respect to services deemed by that agency to have been performed for it by an individual on a voluntary basis.

STATE AND LOCAL LEGISLATIVE EMPLOYEES

SEC. 5. Clause (ii) of section 3(e)(2)(C) (29 U.S.C. 203(e)(2)(C)) is amended—

(1) by striking out "or" at the end of subclause (III),

(2) by striking out "who" in subclause (IV),

(3) by striking out the period at the end of subclause (IV) and inserting in lieu thereof ", or", and

(4) by adding after subclause (IV) the following:

"(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.".

EFFECTIVE DATE

SEC. 6. The amendments made by this Act shall take effect April 15, 1966. The Secretary of Labor shall before such date promulgate such regulations as may be required to implement such amendments.

EFFECT OF AMENDMENTS

SEC. 7. The amendments made by this Act shall not affect whether a public agency which is a State, political subdivision of a State, or an interstate governmental agency is liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6, 7, or 11 of such Act occurring before April 15, 1986, with respect to any employee of such public agency who would have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in section 775.3 of title 29 of the Code of Federal Regulations.

DISCRIMINATION

SEC. 8. A public agency which is a State, political subdivision of a State, or an interstate governmental agency and which discriminates or has discriminated against an employee with respect to the employee's wages or other terms or conditions of employment because on or after February 19, 1985, the employee asserted coverage under section 7 of the Fair Labor Standards Act of 1938 shall be held to have violated section 15(a)(3) of such Act.

I. INTRODUCTORY STATEMENT

The Fair Labor Standards Act of 1938 was enacted on June 25, 1938. The basic policy of the Act is contained in its second section:

> SEC. 2.(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.
>
> (b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

II. HISTORY OF THE ACT

On June 25, 1938, one of the nation's basic labor laws was enacted—the Fair Labor Standards Act of 1938. The first statutory minimum wage was established at 25 cents an hour for the year beginning October 24, 1938. The Act applied to all employees, not specifically exempted, who were engaged in commerce or in the production of goods for commerce.

The original Act provided that the statutory minimum wage would be raised to 30 cents an hour beginning October 24, 1939. A procedure was established for raising the minimum wage by stages to a level of 40 cents an hour, industry by industry, as rapidly as possible; but, in any case, 40 cents an hour was to become the national minimum wage within 7 years after the effective date of the Act; that is, by October 24, 1945.

During the interval, intermediate minimum wages were applied to different industries on recommendation

of industry committees. The last order of the Wage and Hour Administrator raising the minimum wage to 40 cents an hour was issued in July 1944, the year before the date set by the Act of the 40 cents an hour minimum wage rate to become applicable.

The Act also established an overtime rate (not less than 1½ times the employee's regular hourly rate) which was to be paid employees for employment in excess of certain maximum hours in a workweek. Thus, during the first year of the Act, that is, from October 24, 1938, to October 23, 1939, a maximum hours standard of 44 hours a week was applied to covered employees; during the second year, 42 hours became the standard; and after 2 years, the standard was reduced to 40 hours a week. The time-and-one-half penalty overtime rate has never been altered, although amendments were passed in subsequent years increasing the statutory minimum wage and extending coverage to unprotected workers.

After increases in the minimum wage in 1949 and 1955, Congress in 1961 increased the minimum wage rate and expanded the coverage of the Act. The 1961 amendments significantly enlarged the scope of the Act through the addition of another basis of coverage—employment in an "enterprise engaged in commerce or in the production of goods for commerce." Each and every employee of such an enterprise, unless specifically exempted, received the minimum wage and overtime protections of the Act.

Under the Fair Labor Standards Amendments of 1966 (80 Stat. 830) the definition of "enterprise" coverage was extended to enterprises engaged in the following: a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution; a school for the mentally or physically handicapped or gifted children; an elementary or secondary school, or an institution of higher education. The 1966 amendments provided coverage for

both public and private hospitals or institutions. The amendments also extended coverage to both public and private street, suburban or inter-urban electric railways; local trolleys; and motorbus carriers which were subject to state or local regulation. The definition of the term "employer" was amended to remove the exemption for states and their political subdivisions regarding employees of hospitals, institutions, and schools, and for employees of public railways and carriers.

In *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), the Supreme Court upheld the constitutionality of the inclusion of state-operated hospitals and schools under the "enterprise concept" of coverage. The inclusion of state institutions under the Fair Labor Standards Act by Congress did not exceed Congress' power under the Commerce Clause, according to the Court.

In 1974 Congress expanded the Fair Labor Standards Act to cover all state and local government employees, except for a small number exempted, and to a significant number of domestic workers in the Fair Labor Standards Amendments of 1974 (88 Stat. 55). The 1974 amendments also extended Fair Labor Standards Act coverage to a wide range of federal employees, including civilian employees of the military departments, employees of agencies of the executive branch, and employees of the U.S. Postal Service. These employees received the minimum wage and overtime protections of the Act.

The 1974 amendments included a limited overtime exception for police officers, fire fighters, and related employees. (29 U.S.C. 207(k)). Congress established these special provisions in recognition of the special needs of governments and the unusually long hours that these public safety employees must spend on duty, ready and available to respond to calls to protect the public safety. Section 7(k) was intended to alleviate the impact of the Fair Labor Standards Act on the fire protection and law enforcement activities of state and local government by

providing for work periods of up to 28 days (instead of the usual seven-day workweek), establishing somewhat higher ceilings on the maximum number of hours which could be worked before overtime compensation had to be paid, and providing for a gradual phase-in period beginning in January 1, 1975. By the end of the phase-in period, effective January 1, 1978, the maximum number of hours for police officers and fire fighters was to be the lesser of 216 or the average hours of work in work periods of 28 days as determined in statutorily mandated studies. The Secretary of Labor was required to conduct these studies which were intended to ascertain the average number of regularly scheduled hours of work of these employees in order to determine the appropriate hourly level at which the overtime standard should be set. In 1983, the Department of Labor published in the Federal Register the results of its studies establishing the hours standards for law enforcement employees at 171 and for fire protection employees at 212 in a 28-day period (48 Fed. Reg. 40,518). Thus, from the time employers properly elect to cover their fire fighters, police and related employees under the exception of Section 7(k), they need only pay overtime compensation for the hours in the employees' tours of duty that exceeded the levels applicable under that provision.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Supreme Court overruled *Wirtz* and held that both the 1966 and the 1974 amendments were unconstitutional to the extent that they interfered with the integral or traditional governmental functions of states and their political subdivisions. The decision was limited to the minimum wage and maximum hours provisions of the Act and did not extend to the Act's equal pay and child labor provisions or to the Age Discrimination in Employment Act.

Under *National League of Cities*, schools and hospitals, fire prevention, police protection, sanitation, public health,

and parks and recreation were held to be traditional functions of state and local government and, as such, exempt from the Fair Labor Standards Act. On December 21, 1979, the Department of Labor issued final regulations defining traditional and non-traditional functions of state and labor government for purposes of determining whether the Fair Labor Standards Act was applicable. In its regulations, the Department of Labor added libraries and museums to the functions originally determined by the Supreme Court to be traditional (29 CFR 775.4). The Department of Labor defined local mass transit systems, along with seven other functions, as non-traditional (29 CFR 775.3).

A number of public transit authorities challenged the validity of the Department of Labor determination that provision of local mass transit was a non-traditional governmental function. Ultimately, the Supreme Court was presented with the question whether the Department of Labor determination was a proper application of *National League of Cities*.

On February 19, 1985, the Supreme Court expressly overruled *National League of Cities* in *Garcia* v. *San Antonio Metropolitan Transit Authority*, U.S. , 105 S.Ct. 1005 (1985), which restored the full application of the Fair Labor Standards Act to state and local governments. Reasoning that it had "no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause," the Court described its previously promulgated "traditional governmental function" test as "doctrinally barren," and held that "[s]tate sovereign interests • • • are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 105 S.Ct. at 1017, 1018, 1021.

After enumerating various instances where the states "have been able to exempt themselves from a wide variety

of obligations imposed by Congress under the Commerce Clause," the Court observed:

> The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended. (105 S.Ct. at 1020).

As a result of the *Garcia* ruling, states and their political subdivisions are now subject to all Fair Labor Standards Act requirements, including the 171 and 212 maximum hours standard available under section 7(k) for law enforcement and fire protection employees, respectively.

III. Legislative Background

Following the Supreme Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, which overturned the Court's earlier decision in *National League of Cities* v. *Usery* and thereby upheld the authority of Congress to extend the protections of the Fair Labor Standards Act to state and municipal employees, the Committee began to attempt to assess the impact of the Act upon municipal employees, governments, and budgets.

The Committee immediately began to meet with representatives of state and local governments from across the nation, as well as representatives of employee organizations to develop a clear understanding of the impact of compliance.

The estimated cost of compliance to state and local governments ranged initially from a high of $3 billion to a low of $200 million nationwide. Obviously, this large divergence necessitated careful review in order to make sound recommendations to the House. It was essential that those individuals and groups making estimates on compliance projected costs fully understood the Act and those employment practices permitted by the Act. Without this understanding estimates would be greatly in

error. Following are copies of correspondence with the Congressional Budget Office requesting an estimate of the cost of compliance:

U.S. House of Representatives,
Committee on Education and Labor,
Washington, DC, September 18, 1985.

Mr. Rudolph G. Penner,
Director, Congressional Budget Office, U.S. Congress,
Washington, DC.

Dear Mr. Penner: The Subcommittee on Labor Standards is charged with legislative and oversight jurisdiction of the Fair Labor Standards Act (FLSA). In light of the recent Supreme Court decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, many local officials as well as Members of Congress have urged the Subcommittee to take up the issue of the FLSA as it applies to local governments.

Despite a large number of meetings with officials of public interests groups, states, cities, counties and other local governmental bodies, the Subcommittee staff and I have had a difficult time obtaining reliable estimates of the budget impact that FLSA compliance will have on local governments. Given the importance of this issue both to local governments and their employees the Subcommittee feels that substantive remedial legislation, if warranted, ought to be supported by estimates of financial impact which can be verified. The various estimates of impact received by the Subcommittee to date range from minimal to disastrous with no common denominator which would allow the Subcommittee to extrapolate to reach a nationwide total.

For this reasons, I would like to request the assistance of The Congressional Budget Office in compiling a more accurate estimate of the national impact of the Fair Labor Standards Act on local and state governments. I believe that reputation of the CBO would make such a

figure a good baseline standard against which to weigh other information that we receive in our upcoming hearings.

Thank you for your prompt attention to this important matter.

Very truly yours,

AUSTIN MURPHY *Chairman,*
Subcommittee on Labor Standards.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 18 1985.

HON. AUSTIN J. MURPHY,
Chairman, Subcommittee on Labor Standards, Committee on Education and Labor, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has undertaken the study you requested of the potential impact on state and local government budgets of the recent Supreme Court decision in the case of *Garcia* v. *San Antonio Metropolitan Transit Authority* (105 S.Ct. 1005, 1985). Although we have not completed that study, we have enough information to draw some preliminary conclusions, based on information from over 30 states and communities, from concerned organizaions, and from a review of census data on public finances and employment. Our preliminary analysis indicates that full application of the Fair Labor Standards Act (FLSA) wage and overtime provisions as required by the *Garcia* decision would result in initial annual compliance costs totalling between $0.5 billion and $1.5 billion nationwide. Such costs would result from compliance with the overtime payment standards and would likely decrease in subsequent years as public employers renegotiate union contracts and adjust work schedules. This estimate does not include

one-time costs that would be incurred to pay for compensatory time accrued but not used in the same pay period, beginning after February 15, 1985.

The costs associated with the *Garcia* decision are difficult to estimate with precision because of the scarcity of information regarding a number of key factors. For example, the costs depend greatly on the extent to which public employers are already complying with FLSA standards, and on the extent to which states or communities that are not yet complying might change certain management and scheduling practices in order to reduce overtime hours. However, detailed data on the number of employers who would be affected, the number of overtime hours worked by affected employees, the number of public employees already paid premium wages for overtime, and the extent to which state and local governments could find ways to adjust work patterns and wages to avoid incurring additional personnel costs are not available on a comprehensive and reliable basis. In addition, the budgetary cost of compensatory time is uncertain, because it would depend on the extent to which government agencies would need to replace employees to maintain a full staffing level. These factors and other personnel and compensation practices vary sharply from community to community, making it difficult to reliably estimate nationwide costs.

We are continuing to collect information on this subject, and will be pleased to provide the Subcommittee with further information as it becomes available.

With best wishes,

Sincerely,

RUDOLPH G. PENNER, *Director.*

Committee staff members were sent to Los Angeles to obtain more detailed information on the estimated cost to the city and county governments of complying with the

overtime requirements of the Fair Labor Standards Act for firefighters and police officers. Though officials of both governments had presented cost projections at Senate hearings in June and July, those forecasters lacked sufficient detail regarding methodology and variable inherent in the Fair Labor Standards Act compliance had been factored into the calculations.

On October 2 and 3, the staff met with officials of the City and County, and officials of the organizations which represent firefighters and police officers. During those conferences revised cost estimates were submitted and, in some cases, were accompanied by detailed explanations of how the projections were derived. The details provided in the supplementary information proved helpful in gaining an understanding of requirements imposed on those governments in the conduct of their personnel pay practices. These include spending restraints prescribed by state law, as well as obligations dictated by collective bargaining agreements and city/county civil service laws. The meetings helped not only to generate more useful information, but to provide the Committee with more accurate cost estimates with which to assess the degree to which both governments would be able to meet their obligations to firefighters and police officers in accordance with the overtime requirements of the Act.

In addition, the Committee also participated in meetings with local government representatives in Harrisburg, PA, Montpelier, VT, and Portland, Maine, in order to ensure that these individuals and their organizations also correctly interpreted the Act's requirements, since it is clear that many current practices would still be permissible.

Initially, the effects of compliance with the Fair Labor Standards Act were greatly misunderstood by many of those most closely concerned. Information in the first six months following the Supreme Court's decision was largely unavailable, and sometimes found later to be incorrect.

Clearly, the Fair Labor Standards Act permitted the continued use of "comp-time." However, the Act required that comp-time be taken during the same pay period. The extension of pay periods for public safety officers found in Section 7(k) offered even greater flexibility to local governments to continue to use this form of compensation, and therefore reduce estimated costs of compliance.

Also, the Committee's review of compliance efforts revealed the concept of "gap-time." In theory, "gap-time" is that number of hours between the level of hours at which the employer has agreed to pay overtime, and the level required by the Fair Labor Standards Act. Recognizing that the Act requires payment of overtime compensation for hours in excess of a prescribed number of hours worked, and not hours paid, a gap exists in which the employee could be compensated with "comp-time" which could be banked for use beyond the pay period in which the comp-time is earned. The following are copies of correspondence between the Committee and the Department of Labor seeking an opinion on the validity of "gap-time" and the Department's response to a municipal official also seeking an opinion on "gap-time":

U.S. DEPARTMENT OF LABOR,
SECRETARY OF LABOR,
Washington, DC, October 22, 1985.

HON. AUSTIN J. MURPHY,
Chairman, Subcommittee on Labor Standards, Committee on Education and Labor, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter of September 27, on behalf of several individuals who have requested opinions from the Wage and Hour Division (WH) of the Department of Labor (the Department), concerning the application of the Fair Labor Standards Act (FLSA) to law enforcement personnel employed by

public agencies. More specifically, these individuals have asked whether police officers may be granted time off with pay for certain hours of work which are "overtime" hours under a State law, local ordinance, or other provision, but are not overtime hours under FLSA.

Due to the great number of inquiries received by WH as a result of the decision by the U.S. Supreme Court in *Garcia* v. *San Antonio Metropolitan Transit Authority et al. (Garcia)*, 105 S.Ct. 1005 (February 19, 1985), there has been some delay in providing responses. Of the more than 700 inquiries received to date, WH has fully responded to over 500. Many of the more complex issues raised are unique and require detailed legal analysis prior to response.

In order to ensure that the remaining inquiries are responded to in a timely manner, a task force of WH personnel has been established to deal with *Garcia*-related issues on an expedited basis.

An opinion letter which fully addresses the issue of granting time off with pay to law enforcement personnel was issued on October 3, in response to one of the individuals whose inquiry you forwarded to us. In response to their requests, copies have been sent directly to the others, as well as to all other individuals who have made inquiries on this issue. I understand that copies of this opinion letter were delivered to Mr. Jim Riley of your staff on October 3.

You may also be interested to know that, in order to be of all possible assistance to public employers whose employees are now subject to FLSA as a result of the *Garcia* decision, the Department has established a toll-free telephone line in Washington, D.C., for the purpose of providing technical assistance: 800-233-FLSA (3572).

The National Office of WH will take calls on this line and provide information on FLSA as expeditiously as possible. Calls may be placed between 8:15 a.m. and

4:45 p.m. (EDT) Monday through Friday by callers located within the continental United States and Puerto Rico.

If I can be of further assistance, please don't hesitate to contact me.

Very truly yours,

WILLIAM E. BROCK.

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC, September 27, 1985.

Hon. WILLIAM E. BROCK,
Secretary, Department of Labor,
Constitution Avenue NW, Washington, DC,

DEAR MR. SECRETARY: As you are well aware, their is great deal of confusion as to the true impact of the Supreme Court's decision in the case of *Garcia* v. *San Antonio Metropolitan Transit Authority*. From the research that the Subcommittee staff has done and from our hearing on Tuesday, September 24th, it has become quite apparent that many local government officials still do not know what Fair Labor Standards Act compliance will mean to their respective jurisdictions. Unfortunately, many well intentioned municipal managers are misinterpreting the Act, and the result is many of the estimates of projected budget impact received by the Subcommittee are in error.

One area in particular that has caused a great deal of misunderstanding is the question of compensatory time-off or "Comp-Time" allowable under the Act, using the difference in hours between contractual overtime provisions and the statutory requirements for overtime pay as defined in the regulations (so called "Gap-Time"). In the case of uniformed public safety personnel, the 1974 FLSA amendments require overtime pay after approxi-

mately 43 hours per week for police and 53 hours per week for firefighters. Through our meetings and our hearing we have learned that many municipal contracts covering such employees provide for overtime pay or compensatory time-off for all hours worked in excess of 40 hours, or after some number of hours less than that prescribed by the Act.

Obviously, this raises the possibility that many local government employers could continue to offer "Comp-Time" to their employees within the framework of FLSA. As long as those overtime hours compensated with "Comp-Time" are accumulated in the "Gap" between the contractual stipulation for overtime compensation and the statutory requirements of the FLSA it would appear to be permissable under the Act.

Attached are copies of correspondence sent to the Department seeking clarification as to the legality of such an agreement. According to testimony received at our hearing, Mr. James Valin, Assistant Administrator of the Wage and Hour Division, apparently stated in a workshop conducted by the Department for local government managers and labor representatives that this type of arrangement is permissible under the Act. We have been told that this was also confirmed in subsequent conversations with the Wage and House office in Washington. Yet to date, the Department has either been unwilling or unable to provide a formal response to these and other urgent letters seeking guidance. I am sure that you will agree that this situation is totally unacceptable as are the reports that we have received of governmental officials and labor representatives calling local DOL offices and receiving erroneous information or advise on FLSA compliance.

As I am sure you realize, if in fact municipalities and their employees can continue to accrue "Comp-Time" under the provisions of the Fair Labor Standards Act the cost estimates and stated impact of the Act upon municipalities would be greatly reduced. I would therefore appreciate your responding to the Subcommittee as soon as possible as to whether my interpretation of the Act is correct. May local governments operate "Comp-Time" programs in compliance with the Act as the regulations at 29 CFR 553.19 would seem to suggest?

Thank you for your personal attention to this matter, and I look forward to your timely response. I also hope that you will encourage the Employment Standards Administration to make every effort to provide prompt and accurate advice and counsel to local, state, or labor officials who seek assistance in regard to FLSA compliance.

Very truly yours,

AUSTIN J. MURPHY, *Chairman,*
Subcommittee on Labor Standards.

U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, WAGE AND HOUR DIVISION,
Washington, DC, October 3, 1985.

This is in response to your letter of July 24 concerning the effect of the decision by the U.S. Supreme Court in *Garcia* v. *San Antonio Metropolitan Transit Authority et al. (Garcia)*, 105 S.Ct. 1005 (Feb. 19, 1985), on the application of the Fair Labor Standards Act (FLSA) to law enforcement personnel employed by the city of . You ask, on behalf of the , whether police officers may be granted time-off with pay for certain hours of work which are "overtime" hours under a State law, local ordinance, or other provisions, but are not overtime hours under the Fair Labor Standards Act (FLSA). We regret the delay in responding to your inquiry.

Subsequent to your inquiry, we also received a letter from the Office of the City Attorney of , which

provided us with additional information related to the matter of your concern.

You describe a situation where a city has established, pursuant to section 7(k) of FLSA, a 7-day work period for the purpose of computing and paying overtime pay for its police officers. You further indicate that the city and the police officers have negotiated a collective bargaining agreement (CBA) that provides for overtime pay for all hours worked over 40 in a workweek. The CBA also provides that any hours worked over 40 up to 43 in a week may be taken as time-off with pay at a subsequent time. Hours worked over 43 in the 7-day work period would be paid at one and one-half times the employee's regular rate of pay. The CBA provides that time-off earned as outlined above may be accrued without limit.

You ask if the city's method of compensating police officers is in compliance with section 7(k) of FLSA. Assuming the response to be in the affirmative, you ask if it would also hold true for any work period up to 28 days.

Under the FLSA, payment of both the minimum wage (currently $3.35 an hour) and overtime compensation due an employee must ordinarily be made at the regular payday for the period in which the overtime work was performed. It has been a long established principle that an employer may not credit an employee with time-off with pay (even at a time and one-half rate) for FLSA overtime earned which is to be taken at some mutually agreed upon date subsequent to the end of the pay period in which the overtime was earned rather than pay cash for the overtime as it is earned. This principle has been upheld by the U.S. Supreme Court (see *Walling* v. *Harnischfeger Corporation*, 325 U.S. 427 (1945)).

Section 7(k) of FLSA provides a partial overtime compensation exemption for public agency employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions).

Under this provision, a public employer may establish a work period of from 7 to 28 consecutive days in lieu of the workweek for the purpose of computing and paying overtime compensation to fire protection and law enforcement personnel.

Section 7(k) of FLSA is explained generally on pages 18 and 19 of WH Publication 1459, copy enclosed. The maximum hours standard for fire protection personnel ranges from 53 hours worked in a 7-day work period to 212 hours worked in a 28-day work period. The maximum hours standard for law enforcement personnel ranges from 43 hours worked in a 7-day work period to 171 hours worked in a 28-day work period. The regulations of the U.S. Department of Labor relating to the employment of fire protection and law enforcement employees of public agencies are set forth in 29 CFR Part 553 (copy also enclosed).

Section 553.19 of 29 CFR Part 553 explains that section 7(k) of FLSA creates a partial exception to the general rules with regard to the payment of overtime compensation to fire protection and law enforcement employees. Where there is, for example, a State law, local ordinance or other provision, which requires overtime compensation to be paid to such employees at some point earlier than that required by section 7(k) (e.g., for any hours worked in excess of 40 in a week), and that requirement can be met by providing an employee time-off with pay in later pay periods, the practice of providing time-off with pay for these hours of work, which are not FLSA overtime hours, can be continued provided two conditions are met:

(1) The first condition is that the wages which are paid to an employee must, when divided by his or her hours of work during the work period, average no less than the minimum wage.

(2) The second condition is that the employee must be paid not less than one and one-half times his or her regular rate of pay for each FLSA overtime hour of work.

Whenever these two conditions are met, the employee may be granted time-off with pay for hours of work which are not FLSA overtime hours under section 7(k).

Where a police officer is to be paid overtime compensation for hours of work in excess of 40 in a week pursuant to a State law, local ordinance, or other provision, but may elect to take time off with pay in lieu of this overtime compensation, such a practice can be continued to a limited degree. For example, where a police officer is paid $10 an hour and works 45 hours in a 7-day work period, he or she may elect to be credited with time-off with pay at a rate of one and one-half hours off for each hour worked, in lieu of cash wages, for the 3 hours from 41 to 43. In addition, the 44th and 45th hours would be paid at one and one-half times the regular rate of pay, as required by section 7(k) of FLSA. In such a situation, the following calculations must be performed to determine whether the conditions referred to above for granting time-off with pay are met.

The first calculation that must be made is to determine whether the wages paid to the police officer for the work period equal at least the statutory minimum wage. In this situation, the police officer has been paid $420 in straight-time wages for 42 hours of work (40 hours + 2 FLSA overtime hours = 42 × $10 (the hourly rate) = $420). When the $420 is divided by 45 (total hours worked), the employee has been paid an average of $9.33 an hour. Since this is more than the minimum wage, the first condition set forth in section 553.19 for granting time-off with pay is met.

The second condition set forth is that the police officer must be paid, in cash, not less than one and one-half times his or her regular rate of pay for each overtime hour of work under section 7(k) of FLSA. For this example the maximum work hours standard for law enforcement personnel is 43 hours for a 7-day work

period. As the police officer has worked 45 hours during the established work period, he or she would be due 2 hours of FLSA overtime pay (45 hours — 43 hours = 2 hours). As explained in section 553.19(b), the employer must include the cash equivalent of any time-off that the employee has earned when computing the employee's regular rate of pay. This is to assure that the employee's regular rate of pay under section 7(k) is not reduced as a result of participation in a time-off program.

The cash equivalent of the time-off, for purposes of this calculation, shall be $10, the straight-time component of the time-off credit. The cash equivalent ($5) of the "premium" credit for hours worked in excess of 40 in a week pursuant to the State law, local ordinance, or other provision, would be excludable from the regular rate of pay under section 7(e)(5) of FLSA since, although not actually paid, it is similar to the payments excludable under that section. Section 7(e)(5) excludes from the regular rate the payment of a premium rate for hours worked in excess of 8 in a day or in excess of an employee's normal or regular working hours. Similarly, because the cash equivalent of the time-off is included in the regular rate in the week in which it was earned, it would not be considered in determining the regular rate in the week in which the employee takes the time-off.

Therefore, the employee's regular rate of pay would be computed as follows:

Compensated hours—42 hours × $10.00=	$420
Time-off credit—3 hours × $10.00=	30
Cash equivalent of wages paid	450

Computation of FLSA overtime pay:

$450 ÷ 45 hours = $10 (the regular rate of pay)

2 overtime hours × .5 (overtime premium) × $10=$10

The police officer would thus be due $430 ($420 + $10) for his or her hours of work during the 7-day work period.

In this example, the officer would be credited with 4.5 hours of time-off with pay (3 hours × 1.5 = 4.5 hours) for use at some future date. It must be emphasized, however, that time-off with pay is permissible only for hour considered to be "overtime" hours under a State law, local ordinance, or other provision, but not for overtime hours under FLSA. It must be further emphasized that this position applies only to fire protection and law enforcement employees paid pursuant to section 7(k) of FLSA, which was established by Congress in recognition of the uniqueness of their activities.

The principles outlined above would be applicable for a work period of any length under section 7(k) of FLSA.

We trust that the above is responsive to your inquiry. If we can be of further assistance to you, please do not hestitate to contact us again.

Sincerely,

HERBERT J. COHEN,
Deputy Administrator.

In addition to the issue of "comp-time" several other concerns became apparent. Extension of the Fair Labor Standards Act to state and local government employees created a great deal of confusion over the status of volunteers. Although the Department of Labor had already published comprehensive regulations on the definition of volunteers and volunteer activities, the reliance of many public agencies on volunteers produced considerable concern among officials less familiar with the Act and the Department's regulations. In view of these persistent concerns the Committee has drafted suitable language allowing this valuable service to continue, while at the same time ensuring that those individuals classified as volunteers were actually volunteers in the true sense of the word.

Also, many municipalities had concerns about joint employment and occasional employment practices that had previously operated to the mutual benefit of both the employer and employee. Many public agencies had requirements that persons holding public events in the municipality hire off-duty public safety officers for crowd control or security functions. Since those employees agreed to be employed at their own option the Committee believes that these activities should not be unduly prohibited.

Similarly, many municipal employees had engaged occasional part-time employment for their employer in a different capacity at the employee's option. Again, since this type of activity had proven beneficial to both the employer and employee it seemed inconsistent to prohibit their occurrence as long as restrictions exist to prevent abuse.

The Court's decision in *Garcia* suddenly required all state and local governments to comply with the Act, and therefore immediately made those governments liable for any violations of the Act. The Committee realized that it was unrealistic to expect these state and local governments to be in conformance with the Act that quickly, and the Committee agreed that it was necessary to consider means of relieving that liability for a reasonable period of time to enable the governments to comply, while at the same time recognizing the rights of the employees.

It became apparent to the Committee that the needs of state and local governments were unique and that it was necessary to amend the Fair Labor Standards Act. Many municipal employees both enjoy "comp-time" and need it to enable them to better perform their jobs. Also, the confusion resulting from the classification of volunteers, and the mandates of many governments that off-duty public safety personnel be hired to perform functions by separate and independent public employers required clarification in the Act.

IV. Purposes of the Legislation

In seeking to guarantee fundamental standards for all working Americans, the Fair Labor Standards Act is one of the nation's most significant efforts to direct economic resources into socially desirable channels. The minimum wage protections in section 6 of the Fair Labor Standards Act reflect a national policy that workers should not be forced to work at hourly wages that are below acceptable living levels. The longstanding purposes of the overtime provisions in section 7 are to fairly and fully compensate employees who must work long hours while encouraging employers to reduce the hours of work and to hire additional persons.

By 1974, Fair Labor Standards Act coverage extended to three-fourths of the nation's workers. Federal, state, and local government employees were the only major exceptions. Federal workers now have been protected for more than a decade, but most state and local government employees only became covered as of the Supreme Court's *Garcia* v. *San Antonio Metropolitan Transit Authority* decision in February 1985. The Committee is not retreating from the principles established by Congress in the 1966 and 1974 Fair Labor Standards Act amendments. The rights and protections accorded to employees of the federal government and the private sector also are extended to employees of the states and their political subdivisions.

At the same time, it is essential that the particular needs and circumstances of the states and their political subdivisions be carefully weighed and fairly accommodated. As the Supreme Court stated in *Garcia*, "the states occupy a special position in our constitutional system." The Committee recognizes that state and local governments, unlike other employers, have special responsibilities in promoting the public good. In reporting this bill, the Committee seeks to discharge that responsibility and to further the principles of cooperative federalism.

In particular, in the wake of *Garcia*, some of the states and their political subdivisions have identified several areas in which they would be adversely affected by immediate application of the Fair Labor Standards Act. This legislation responds to these concerns by adjusting certain Fair Labor Standards Act principles with respect to employees of states and their political subdivisions and by deferring the effective date until April 15, 1986 of certain provisions of the Fair Labor Standards Act insofar as they apply to the states and their political subdivisions.

The Committee recognizes that the financial costs of compliance with the Fair Labor Standards Act—particularly the overtime provisions of section 7—are a matter of serious concern to many states and localities. The Committee has received extensive testimony on this subject from representatives of state and local governments as well as from organized labor. Although the testimony reflects sharp disagreements as to the nature and extent of the Fair Labor Standards Act compliance costs, the Committee concludes that states and localities required to comply with the Fair Labor Standards Act will be forced to assume some additional financial responsibilities.

Jurisdictions that had relied for a decade upon the exemptions accorded under *National League of Cities* would be required to meet Fair Labor Standards Act standards immediately under *Garcia*. Many jurisdictions properly and successfully have undertaken to do so and the Committee commends their efforts to comply with the basic overtime protections afforded by the statute. Other jurisdictions, however, have expressed an urgent need for a phase-in so that they may reorder their budgetary priorities while maintaining fiscal stability in response to the immediate impact of *Garcia*. Following the example of the 1974 amendments the Committee again allows for a phase-in for state and local governments to comply with certain requirements of the Fair Labor Standards Act.

The Committee is also aware that many state and local government employers and their employees have agreed to voluntary arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements—frequently the result of formal collective bargaining—reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, the bill accommodates such pre-existing arrangements. In addition, the bill offers these employees and their employers the opportunity to voluntarily agree to the acceptance of compensatory time off at a premium rate in lieu of pay for overtime.

The bill provides for the determining of overtime compensation for special detail work by fire protection and law enforcement employees, occasional or sporadic employment by public employees and the substitution of work by fire protection and law enforcement employees. The bill excludes volunteers from the minimum wage and overtime requirements of the Act and exempts employees of state and local legislative bodies, except legislative library employees, from coverage.

The bill prohibits any discrimination by a state or local government employer against an employee with respect to wages or other terms and conditions of employment because of asserted coverage under section 7 of the Fair Labor Standards Act since the *Garcia* decision on February 19, 1985. While the Committee has postponed the obligation of these employers to comply with the Fair Labor Standards Act overtime provisions, their employees should not be left without a remedy if they have been subjected to discriminatory treatment in their compensation or employment conditions as a result of their assertion of coverage under the Act. Accordingly, employees who are, or have been, victims of such discrimination may pursue full relief under Fair Labor Standards Act sections 16 and 15(a)(3).

V. Comments on Major Provisions

A. COMPENSATORY TIME

Section (2) of the bill amends section 7 of the Act to provide flexibility to state and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees. The new subsection 7(o), created by this bill, would authorize public employers to provide compensatory time off in lieu of monetary overtime compensation that otherwise would be required by the relevant provisions of section 7 of the Act regarding various types of employees. Compensatory time received by an employee in lieu of cash must be at the premium rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the premium rate of not less than one and one-half times the regular rate of pay.

One of the main areas of complaint from many state and local government employers, as well as some groups of employees, was the general prohibition against awarding compensatory time off for overtime work in lieu of monetary compensation. The Fair Labor Standards Act customarily has been interpreted by the Secretary of Labor as precluding the use of compensatory time for statutory overtime hours. In addition, consistent with the purposes of the Fair Labor Standards Act, the obligation to compensate employees at the rate of time and one-half created a financial incentive for employers to reduce hours and hire more employees whereas the widespread use of non-premium compensatory time would frustrate the achievement of these objectives.

Previously, as noted in this report, compensatory time within the framework of the Act was limited to compensatory time off within the same pay period, usually to ensure that the employee did not exceed the maximum of

straight time hours permitted under section 7 of the Act. Existing compensatory time systems have also operated within the so called "gap time" between contractual obligations to pay overtime and the requirements of the statute. While "gap time" compensatory time could be accumulated and held beyond the immediate pay period as stipulated in the regulations promulgated by the Secretary of Labor and found at 29 CFR 553.19, these arrangements were nevertheless much more restricted than most traditional compensatory time systems.

While the Committee appreciates the employee protection principles and job creation purposes of the overtime provision of the Fair Labor Standards Act, it also recognizes the mutual benefits arising from a number of situations where state and local government employees and their employers have had agreements or longstanding arrangements where compensatory time off was provided for overtime hours worked by the employees. The *Garcia* decision and with it the re-application of the Fair Labor Standards Act to most public employees effectively ended most traditional compensatory time systems. It, therefore, eliminated the freedom and flexibility enjoyed by public employees and the additional options such systems have provided to the public employer faced with extraordinary demands for public services yet constrained by strict limits on available revenue.

Keeping in mind the fundamental protections afforded to employees under the Fair Labor Standards Act, the Committee concludes that compensatory time should be available to state and local government workers and their employers under certain conditions. Accordingly, a new subsection 7(o) is added to the Fair Labor Standards Act to provide state and local government employees with the opportunity to be compensated for overtime hours with compensatory time off in lieu of monetary compensation. Compensatory time would be allowed pursuant to an agreement entered into between the employers or their representative and the employer prior to the performance of the overtime work, or with prior notice to the em-

ployees, provided that the hours for compensatory time granted in lieu of cash are compensated at the premium rate of not less than one and one-half hours for each hour of overtime work. The Committee encourages employers and employees to enter into such mutual agreements to the extent possible.

1. Agreement or understanding

The use of compensatory time in lieu of cash must be pursuant to some form of agreement or understanding between the employer and employee, or notice to the employee, prior to the performance of the work. Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a representative, the agreement or understanding must be between the employer and the individual employee.

The agreement or bilateral understanding to provide time off as compensation for overtime may take the form of an expressed condition of employment, so long as (1) the employee knowingly agrees to it as a condition of employment, and (2) the employee is informed that the compensatory time received may be preserved, used, or cashed out consistent with the provisions of this new subsection. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as those provisions are consistent with this subsection and the remainder of the Act.

In the case of employees who have no representative and were employed prior to April 15, 1986, an employer that has had a regular practice of awarding compensatory time in lieu of overtime pay shall be deemed to have

reached an agreement or understanding with these employees as of April 15, 1986. The primary purpose of this provision is to protect those pre-existing practices where employees and employers have utilized compensatory time instead of cash payments for overtime work. The Committee does not intend that employers who have had such a regular practice be required to secure an agreement or understanding with each employee prior to the effective date of this subsection.

If, however, a regular practice of awarding compensatory time to employees without a representative does not conform to the remaining requirements of this subsection, it must be modified to do so by April 15, 1986. A practice of awarding compensatory time in lieu of overtime pay initiated by an employer between the date of enactment and April 15, 1986 would not be a regular practice of sufficient duration to permit the employer to avoid the obligation to enter into an agreement or understanding with, or providing prior notice to, the affected employees.

As mentioned above, the compensatory time provisions are designed to allow the preservation of regular past practices that have proved mutually beneficial to employees and employers, and to afford the parties the opportunity to enter into appropriate agreements allowing the acceptance of compensatory time rather than cash payments.

2. Preservation, use, and cashing out

The Committee has sought to balance the employee's right to make use of compensatory time that has been earned and the employer's interests in avoiding a disruption in operations. An employee whose work includes on a regular or recurring basis public safety activity, emergency response activity, or seasonal activity may accrue a maximum of 480 hours of compensatory time. Employees performing work in other activities may ac-

crue compensatory time up to a maximum of 180 hours. Hours accrued prior to April 15, 1986, do not count toward these limits. The 480 hour limit represents 320 hours of actual overtime worked, and the 180 hour limit represents 120 hours of actual ovetime worked, times the one and one-half premium rate. Once these limits are reached, an employee either must be paid in cash for additional accrued hours or else must use some compensatory time before any additional overtime hours may be compensated in the form of compensatory time off. For example, if a law enforcement employee with 480 accrued hours received compensation for 30 of these hours, either in the form of cash or time off, the employee may work another 20 hours of overtime and thus accrue another 30 hours at the premium rate. But if that employee has accrued 480 hours and then works additional overtime before drawing down that accrued amount, such additional overtime must be compensated in cash. The presence of a limit on the number of accrued hours does not mean that all 480 or 180 hours must be accrued before compensatory time may be used.

The Committee does not intend that employees whose work includes seasonal, emergency response or public safety activity as well as other work be subject to two different limits on accruable compensatory time. As long as the employee's work regularly includes the activities included in the higher cap, the employee will be covered by the higher cap. The Committee does not expect to find that after the enactment of these amendments local government employees are suddenly reclassified with additional designations as emergency personnel. Similarly, the Committee assumes that local government administrators will resist the temptation to assign their clerical employees or their support staff to an afternoon of shoveling snow on the courthouse steps or a day with the ambulance crew simply to bump the compensatory time cap to the higher level. The Committee expects good faith compliance by public employers and would direct the Secretary

of Labor to enforce these amendments so as to prevent such attempts to evade Congressional intent.

Considerable focus has been given to the question of seasonal activity. Seasonal activity is not limited strictly to those operations that are very susceptible to changes in the weather. Obviously, parks and recreation activity in general are primarily seasonal since they experience peak demand during fair weather seasons or other sport seasons and largely dormant periods at other times. Road crews, while not necessarily seasonal workers, may nevertheless have significant periods of peak demand, for instance during the snow plowing or road construction season. In such an instance the snow plow operator/road crew employee would be able to accrue compensatory time to the higher cap, while other employees of the same department who do not have lengthy periods of peak seasonal demand would remain under the lower cap. Auditoriums, theaters, and sports facilities that are open for specific limited seasons, would meet a seasonal test, facilities that operate year round would not. Mere periods of short but intense activity do not make an employee's job seasonal in nature; therefore, clerical employees working increased hours for several weeks on a city budget or processing insurance forms or tax notices would not need the higher compensatory time cap since the limited periods of increased activity could be accommodated within the lower limit. In determining which employees would be considered seasonal, the Secretary of Labor should first determine whether the "seasonal activity" is a regular and recurring aspect of the employees' work and then whether the projected overtime hours during the "season" of significantly increased demand exceeds the number of compensatory time hours available under the lower cap.

Regardless of the number of hours accrued, the employee has the right to be paid for or use accrued compensatory time subject to this subsection. It is expected that the rate of compensation for cashing out accrued

compensatory time shall be at the presumably higher rate earned by the employee at the time the cashing out takes place. Because an employee's rate of pay is likely to increase over a period of time in most employment situations, it is anticipated that many employers will have a fiscal incentive to allow for the use of accrued compensatory time.

The right to be paid arises no later than the time of termination from employment. By termination, the Committee intends to include situations in which the employee is separated from a job voluntarily (including retirement), is terminated by an employer, dies, or otherwise leaves a job. At a minimum, the employee is entitled to be paid for the usual compensatory time at a rate not less than the average rate received by such employee during the last three years of the employee's employment. It is understood that an employer may not decrease an employee's rate of pay in order to avoid or undermine the intent of this cash-out provision.

The employee also has the right to use some or all of accrued compensatory time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operations. Use of the term "reasonable" is intended to accommodate varying work practices based on the facts and circumstances of each case. When an employer receives such a request for the use of compensatory time, that request should be honored unless to do so would be unduly disruptive. By the term "unduly disrupt," the Committee means something more than mere inconvenience. For example, a request by a snow plow operator in Vermont to use 40 hours of compensatory time in February probably would be unduly disruptive. This would be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June or hunting season probably would not be unduly disruptive.

The Committee is very concerned that public employees in offices with regular year-round functions, short staff, and steady demands will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time. It is the Committee's views that an employee should not be coerced to accept more compensatory time in lieu of overtime pay in a year than an employer realistically and in good faith expects to be able to grant to that employee if he or she requests it within a similar period. To do otherwise would permit public employers to enjoy the fruits of the overtime labor of the employees without having to pay the overtime premium required by the Act. Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation. Where public employers find that they cannot make requested time off available even outside of the periods of increased demand that all public service operations experience in the course of their business, they should consider allowing employees to cash out requested but unavailable compensatory time. For those employees where the problem of disruption is persistent, compensatory time should not be the preferred method of compensation for overtime work.

B. SPECIAL EMPLOYMENT SITUATIONS

A new subsection 7(p) is added to the Fair Labor Standards Act to address the area of joint employment and other special employment situations. Under the current Fair Labor Standards Act joint employment regulations, there are some situations in which an employee who works for two separate employers or in two separate jobs for the same employer has all of the hours worked credited to one employer for purposes of determining overtime liability. The Committee preserves this Fair Labor Standards Act protection so as to prevent such abuses as manipulation of job scheduling or rotation of workers to circumvent overtime requirements. At the

same time, the Committee recognizes that there are exceptional circumstances for which special provisions should be made as discussed below.

1. Special detail work

An employee engaged in public safety activities is at time offered to accept optional special detail work for a separate and independent employer on the employee's off-duty time. These special details include the police officer who accepts extra employment from a school board to direct traffic at a football game, or from a promoter to furnish crowd control at a rock concert or convention. Such opportunities may result from a local legal requirement promulgated by the governing body which is also the employee's primary employer. The requirement may specify that a separate and independent employer must hire sworn law enforcement personnel for these functions, pay such personnel through the primary employer's payroll system, or otherwise adjust or alter their ordinary working conditions. In these situations, the current Fair Labor Standards Act joint employment regulations require that the hours worked for the separate and independent employer be combined with the hours worked in the employee's primary job in the calculation of overtime. Under this subsection, the joint employment rule would not apply so long as (1) the special detail is worked solely at the employee's option; (2) the two employers are in fact separate and independent; and (3) the primary employer requires, facilitates or affect the performance of the work, as set forth in subsections 7(p)(1)(A), (B), and (C). For example, a school system's employment of police officers to direct traffic at a football game where local ordinance requires that only sworn police officers be used for such duty and where the work is solely at the option of the police officers would qualify for separate treatment under the exception to the Fair Labor Standards Act. By contrast, the assignment of special details

of policy officers to cover the extra load of police work required by a large convention where that assignment is not solely at the option of these officers would not qualify. This would be true even if the body holding the convention reimburses the primary employer for the costs of these services. An employee choosing to work for a separate branch of his or her employer does not qualify for the special detail provisions.

2. Occasional employment in a different capacity

An employee of a state of local government may have the opportunity to work at his or her option on an occasional or sporadic basis in a different capacity from his or her regular employment. The Committee recognizes that in the delivery or certain types of public services there is from time to time a need for additional resources to deal with special events or certain types of activities. Public recreation and park facilities and related stadium and auditorium activities often provide this type of occasional employment opportunities. Types of employment might typically include officiating at youth or other recreation and sports events, even if the events or activities follow a regular schedule on a seasonal or other basis, taking of tickets, security for special events, and food and beverage sales at special events. To meet these recurring but intermittent needs, a public park and recreation agency or school district may employ an individual who is otherwise employed by the same employer in another capacity or another employer in the same government jurisdiction.

The Committee recognizes that this type of activity, entered into freely by the employee, mutually benefits both the employee and the employer. For the purposes of this Act, this type of employment is considered employment in a second capacity and as such it would not be considered as hours worked for the purposes of calculating overtime pay or compensatory time.

However, additional work regularly performed on a scheduled basis by a public park and recreation employee in a second job for the agency would be considered as hours worked for the same employer. An example would be an employee who, in addition to his or her regular job, also regularly works additional hours at a park food and beverage sales center.

The Committee expects the Secretary of Labor in promulgating regulations to interpret "different capacity" in the strictest sense so as to prohibit instances where a public safety employee might be encouraged to take on any kind of security or safety function within the same local government. The Committee clearly intends "different capacity" to bar any occasional or sporadic assignments within the same general occupational category as the employee's regular work.

3. Substitute work hours

Public employees have been allowed to work for one another, with the approval of their employer, without affecting the computation of overtime for either employee. Current Fair Labor Standards Act regulations may raise questions as to the propriety of such a practice. Subsection 7(p)(3) would allow one employee to substitute and work for another such employee if the substitution was (1) voluntarily undertaken and agreed to solely by the employees and (2) approved by the employer. If two employees trade hours pursuant to this subsection, each employee will be credited as if he or she had worked his or her normal work schedule. Employers of employees who perform substitute work under this subsection are not required to keep a record of the hours of the substitute work for purposes of overtime compensation.

C. VOLUNTEER SERVICES

A new paragraph 3(e)(4) is added to the Fair Labor Standards Act to make clear that persons performing

volunteer services for state and local governments should not be regarded as "employees" under the statute. The Committee does not intend to discourage or impede volunteer activities undertaken for humanitarian purposes. At the same time, the Committee wishes to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon employees to "volunteer."

To this end, the paragraph provides that an individual who performs services on a volunteer basis for a state or local government shall not be deemed an employee for Fair Labor Standards Act purposes, even if the individual receices expenses, a nominal fee or reasonable benefits to perform the services. Thus, for example, a volunteer school crossing guard does not become an "employee" because he or she receives a uniform allowance and/or travel expenses.

An individual employed by an employer may volunteer to perform a service for the same employer if that service is in a capacity different from that individual's regular job. For example, a clerk at a state mental health facility may volunteer to visit with patients or take them on outings. However, an individual who is employed by one employer will be considered an employee under the Fair Labor Standards Act if the individual volunteers to provide the same type of services for the same employer. To illustrate, a nurse employed by a state hospital may not volunteer nursing services at a state-operated health clinic; the nurse may, however, perform such services as a volunteer at a county clinic.

In section 3, a new subparagraph (B) is added which provides that a state or local government employee may perform volunteer services for another public agency without regard to the Fair Labor Standards Act overtime requirements, even if the two governmental entities have entered into a mutual aid agreement. Thus, where Town A and Town B have entered into a mutual aid agreement,

a fire fighter employed by Town A who also is a volunteer fire fighter for Town B will not have his or her hours of voluntary services for Town B counted as part of his or her employment with Town A.

The Secretary of Labor is directed to issue regulations to implement this section by March 15, 1986. If, prior to April 15, 1986, a state or local government had a practice of treating certain individuals who performed services as volunteers, these individuals shall be considered volunteers rather than employees until April 15, 1986, for purposes of the Fair Labor Standards Act. In addition, state and local governments are relieved of liability for a violation of the minimum wage provisions of section 6 of the Fair Labor Standards Act occurring before April 15, 1986 with regard to services performed for the public agency by an individual who was performing such services as a volunteer.

Additionally, in order to assuage the serious, even if unfounded, concerns of some local officials, the Committee wishes to clarify the status of jurors. The Fair Labor Standards Act as it applies to state and local government entities, is not intended by the Congress to include as employees covered by the Act individuals who received a fee in connection with performance of a civic responsibility. Such fees are honoraria and are not wages or salaries.

D. EMPLOYEES OF STATE AND LOCAL LEGISLATIVE BODIES

The exemption from the Fair Labor Standards Act's overtime provisions for employees of state and local legislative bodies is intended to exempt these employees to the same extent as employees of the Congress are exempted under section 3(e)(2)(A). Therefore, just as employees of the Library of Congress are not exempt from these provisions, neither are employees of a state or local legislative library. Existing law provides a series of exemptions for state and local legislative employees, but questions have been raised as to whether these exemptions are

as broad as the Congressional exemption. The purpose of this new provision is to clarify that this is now the case.

It is not the intent of the provisions embodied in section 5 of these amendments to exempt employees of school districts or higher education institutions who do not qualify for exemption under another provision from coverage under the Fair Labor Standards Act.

E. REGULATIONS

The Secretary of Labor is directed to issue regulations by April 15, 1986 which implement certain provisions of the amendments. However, the Secretary is directed to issue regulations by March 15, 1986 with regard to section 4 of the amendments. This directive is consistent with the traditional statutory responsibility and the authorization given to the Secretary of Labor to prescribe regulations interpreting the Fair Labor Standards Amendments of 1974 with respect to the local, state and federal employees who were brought under the Act at that time. The Committee encourages the Secretary of Labor to publish these regulations as soon as possible in order to provide adequate opportunity for comment, promulgation, and implementation.

F. EFFECTIVE DATE

The amendments to section 7 (compensatory time and joint employment) and section 3 (volunteers and employees of state and local legislative bodies) take effect April 15, 1986 (except that the Secretary of Labor is to promulgate applicable regulations prior to that date). State and local government employers who are engaged in traditional functions as described by the Regulation at 29 CFR 775.2 and 775.4 (schools, hospitals, fire prevention, police protection, sanitation, public health, parks and recreation, libraries, museums) are relieved of overtime liability until April 15, 1986. The Committee has deferred application of the Act's overtime provisions until exactly one year after the mandate in *Garcia* so that state and local governments may make appropriate adjustments in their work practices, staffing patterns, and fiscal priorities. Further, because many state and local governments begin their fiscal years on July 1, the amendments allow actual payment of monetary overtime compensation to be delayed until August 1, 1986 without penalty. Liability, however, in all instances will commence on April 15, 1986. The compensatory time provisions described above also become applicable to existing collective bargaining agreements on that date. The provision prohibiting discrimination shall take effect upon enactment.

The April 1986 effective date is not intended to encourage public employers from postponing their efforts to comply with the Act's overtime provisions. To the contrary, the Committee lauds those jurisdictions that have taken, and continue to take, positive action regarding employees overtime protection consistent with the Act.

Finally, these amendments do not affect whether employees of state and local governments who are engaged in nontraditional functions as defined by the Department of Labor at 29 CFR 775.3, notably local mass transit systems, are covered by the Act prior to April 15, 1986. The Committee is aware that the question of whether transit employees, prior to the decision in *Garcia*, were entitled to the Act's compensation for overtime hours worked is still being litigated in federal courts. The amendments are intended to protect the rights of both parties to resolve their differences through litigation, without taking a position on the matter.

G. DISCRIMINATION

Section 8 of the bill makes it unlawful, on or after February 19, 1985, for any state or local government entity to discriminate against an employee with respect to his or her wages or other terms or conditions of em-

ployment because of the employee's asserted coverage under the overtime provisions of the Act. It is the Committee's intention that employees who are victims of such discrimination may seek relief available under Section 15(a)(3) and Section 16 of the Act. For example, an employer who reduces an employee's straight time wages or regular rate of pay simply because of asserted Fair Labor Standards Act coverage would be liable under this provision. Further, this provision would prohibit the discharge, or any other form of retaliatory action, taken against an employee because of assertion of coverage under the Act. The Committee encourages employers to make every effort to conform to the fundamental standards of the Act.

VI. Committee Consideration

The Subcommittee on Labor Standards convened a hearing on the impact of compliance with the Fair Labor Standards Act on state and local governments on September 24, 1985. Testimony was received from the following individuals and organizations.

Hon. Edward Koch, Mayor, New York, NY on behalf of the National League of Cities and the U.S. Conference of Mayors;

Victor Gotbaum, Director, District 29, American Federation of State, County and Municipal Employees;

John J. Sweeney, General President, Service Employees International Union;

John A. Gannon, President, International Association of Firefighters;

Robert Thompson, President, Amalgamated Transit Local #694, San Antonio, Texas;

Eric S. Lamar, President, International Association of Firefighters Local #2068;

Gary Brazgel, President, Milwaukee Police Association;

Robert Porter, Secretary-Treasurer American Federation of Teachers;

Hon. Edward R. Zuccaro, Member, Vermont House of Representatives, on behalf of the National Council of State Legislatures;

Hon. Anita Anderegg, County Executive, Fond du Lac, WI, on behalf of the National Association of Counties.

H.R. 3530 was unanimously reported to the Committee on Education and Labor by the Subcommittee on Labor Standards on October 10, 1985.

Full Committee Rollcall Statement

The Committee on Education and Labor reported this bill as amended by voice vote on October 23, 1985.

Congressional Budget Office Estimate

In compliance with clause 2(1)(3)(C) of Rule XI of the Rules of the House of Representatives, the estimate prepared by the Congressional Budget Office pursuant to section 403 of the Congressional Budget Act of 1974, submitted prior to the filing of this report, is set forth as follows:

U.S. Congress,
Congressional Budget Office,
Washington, DC, October 24, 1985.

Hon. Augustus F. Hawkins,
Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 3530, the Fair Labor Standards Amendments of 1985, as ordered reported by the House Committee on Education and Labor, October 23, 1985.

We estimate that this bill would have no cost to the federal government, and would result in significant savings for state and local governments.

H.R. 3530 would amend the Fair Labor Standards Act (FLSA) as it now applies to nonfederal units of government. The bill would allow states and localities to grant employees one and one-half hours of compensatory time off for every hour of overtime worked, in lieu of paying cash premiums for overtime. The bill would require that public safety and seasonal employees receive cash compensation for overtime after accumulating 480 hours of compensatory time. All the public employees would have to receive cash compensation for overtime after accumulating 180 hours of compensatory time. Jurisdictions that maintain collective bargaining relationships would be allowed to preserve contract provisions that provide compensatory time for overtime. Public employees would be allowed to use accrued compensation time within a reasonable amount of time. Upon termination of employment, unused compensatory time would have to be paid for based on the average rate of pay received by an employee during the last three years of employment.

H.R. 3530 would further amend the FLSA to exclude from the calculation of overtime occasional part-time or volunteer work by public employees for different agencies within the same jurisdiction or for a different jurisdiction. Persons working for nonfederal units of government on a voluntary basis and all persons employed by state and local legislative bodies, except employees subject to civil service laws and library personnel, would be exempt from coverage under the FLSA.

Finally, H.R. 3530 would set April 15, 1986 as the compliance date for applying the FLSA to state and local employees and would allow public employers to delay payments for overtime until August 1, 1986. Any FLSA liability that may exist prior to April 15, 1986 would be eliminated.

CBO estimates that no cost to the federal government would result from enactment of this legislation, because it would not significantly affect the amount of Department of Labor activity in enforcing the FLSA. CBO estimates, however, that H.R. 3530 would significantly reduce the budget impact of extending the FLSA to state and local governments, as would be required under the recent Supreme Court decision in the case of *Garcia v. San Antonio Metropolitan Transit Authority* (105 S. Ct. 1005, 1985).

CBO has not completed its study of the potential impact of the *Garcia* decision on state and local government budgets. Our preliminary analysis, based on information from over 40 states, communities, and concerned organizations, indicates that full application of the FLSA wage and overtime provisions as required by that decision would result in initial annual compliance costs totaling between $0.5 billion and $1.5 billion nationwide. Such costs would result from compliance with the overtime payment standards and would decrease in subsequent years as public employers renegotiate union contracts and adjust work schedules. This estimate does not include one-time costs that would be incurred to pay for compensatory time accrued but not used in the same pay period, beginning after February 15, 1985.

We estimate that the bill would save most of these compliance costs, by delaying compliance with the FLSA standards until April 1986, eliminating retroactive liability, and restoring the option of using compensatory time off rather than cash payments for overtime. The costs associated with the *Garcia* decision and the savings resulting from this bill are difficult to estimate with precision because of the scarcity of information regarding a number of key factors. For example, the savings depend greatly on the extent to which public employers are already complying with FLSA standards, and on the extent to which states or communities that are not yet

complying might change certain management and scheduling practices in order to reduce overtime hours. However, detailed data on the number of employees who would be affected, the number of overtime hours worked by affected employees, the number of public employees already paid premium wages for overtime, and the extent to which state and local governments could find ways to adjust work patterns and wages to avoid incurring additional personnel costs are not available on a comprehensive and reliable basis. In addition, the budgetary cost of compensatory time is uncertain, because it would depend on the extent to which government agencies would need to replace employees to maintain a full staffing level. This factor and other personnel and compensation practices vary sharply from community to community, making it difficult to reliably estimate nationwide costs.

We are continuing to collect information on this subject, and will be pleased to provide the Committee with further information as it becomes available.

With best wishes,

Sincerely,

ERIC HANUSHEK
For Rudolph G. Penner, Director).

COMMITTEE ESTIMATE

With reference to the statement required by clause 7(a)(1) of Rule XIII of the Rules of the House of Representatives, the Committee agrees with the estimate prepared by the Congressional Budget Office.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of Rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment of H.R. 3530 will have no significant inflationary impact on prices and costs in the operation

of the national economy. The principal result of this legislation will be to enable state and local governments to use compensatory time in lieu of payment of monetary overtime compensation for overtime hours worked by their employees. State and local governments should therefore be able to comply with the Fair Labor Standards Act without necessitating increases in their taxes.

COMMITTEE OVERSIGHT REVIEW

With reference to the statement required by clause 2(1)(3)(A) of Rule XI of the Rules of the House of representatives regarding any findings or recommendations pursuant to this Committee's oversight reviews or studies, the Subcommittee on Labor Standards conducted by this legislation.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

With reference to the statement required by clause 2(1)(3)(D) of Rule XI of the Rules of the House of Representatives, no findings or recommendations of the Committee on Government Operations have been submitted to this Committee concerning the subject matter specifically addressed by H.R. 3530.

SECTION-BY-SECTION
ANALYSIS OF FAIR LABOR STANDARDS
AMENDMENTS OF 1985

SECTION 1. SHORT TITLE; REFERENCE TO ACT

Subsection (a) provides that the bill when enacted may be cited as the "Fair Labor Standards Amendments of 1985." Subsection (b) is a technical provision.

SECTION 2. COMPENSATORY TIME

Subsection (a) amends Section 7 of the Act adding a new subsection (o). New subsection 7(o)(1) provides

that as of April 15, 1986, employees of State and local governments may receive, in lieu of overtime compensation, compensatory time off at the rate of not less than 1.5 hours of compensatory time for each hour of overtime worked.

New subsection 7(o)(2) sets prerequisite conditions and limitations on the granting of compensatory time. (A) Compensatory time may only be offered pursuant to a collective bargaining agreement or other agreement or understanding between the employer and the employee or the employees' selected representative, or with prior notice to the employee, before the performance of the overtime work. (B) An employee may not accrue compensatory time in excess of the appropriate limit on accrued but unused compensatory time. Subsection 7(o)(2) also makes it clear that for employees hired before April 15, 1986 the employers' regular practice of providing compensatory time would constitute an agreement as long as it confirmed to the other requirements of these amendments.

New subsection 7(o)(3)(A) states that employees whose jobs include public safety, emergency response, or seasonal work may not accrue or bank compensatory time in excess of 480 hours. For all other employees the limitation would be set at 180 hours.

New subsection 7(o)(3)(B) provides that if accrued compensatory time is bought out, or cashed in, the compensation received would be at the employee's regular rate at the time of the payment.

New subsection 7(o)(4) states that upon termination an employee will be paid for any accrued but unused compensatory time at a rate not less than the average regular rate received by the employee during the previous three (3) years.

New subsection 7(o)(5) requires that an employee must be permitted by the public employer to use requested

compensatory time within a reasonable time after making a request unless the use of the compensatory time would unduly disrupt the operations of the public agency.

New subsection 7(o)(6) defines (A) overtime compensation and (B) compensatory time.

Subsection (b) provides that existing collective bargaining agreements providing for compensatory time for overtime worked will continue in effect except for modifications to bring the terms "compensatory time" in the provisions of the agreements into conformity with the time and one half rate and other requirements of these amendments.

Subsection (c) provides (1) that public employers will not be liable for overtime and related paperwork violations of the Act until April 15, 1986 for those "traditional" public employees affected by the *Garcia* decision, and (2) that public employers may defer until August 1, 1986 the payment of monetary overtime compensation for hours worked after April 15, 1986.

SECTION 3. SPECIAL DETAILS, OCCASIONAL OR SPORADIC EMPLOYMENT, AND SUBSTITUTION

Subsection (a) amends Section 7 of the Act by adding a new subsection (p).

Subsection 7(p)(1) provides that special detail work by a public safety employee at the employee's own option for a separate and independent employer shall not be counted as hours worked for the purpose of overtime pay by the employee's regular public employer.

Subsection (b) adds a new provision 7(p)2 providing that the hours worked by a public employee at the employee's option on an occasional or sporadic basis in a different capacity from the employee's regular employment shall not be counted by the employee's regular employer as hours worked purposes of overtime purposes.

Subsection (c) adds a new subsection 7(p)(3) allowing a public safety employee with the consent of the employee's employer to substitute for another employee without the substitution hours counting as hours worked for overtime purposes. It also eliminates the need for employers to keep records of substituted hours for overtime purposes.

SECTION 4. VOLUNTEERS

Subsection (a) amends section 3 of the Act adding a new paragraph (4) stating that an individual who volunteers to perform a service for a public agency shall not be considered an employee of that agency for purposes of the Act, providing he or she is volunteering his or her services for a different employer or in a different job for the same employer. A volunteer may be provided reasonable benefits, expenses, or a nominal fee or any combination thereof.

Subsection (b) instructs the Secretary of Labor to issue regulations on volunteers by March 15, 1986.

Subsection (c) provides that public employers will not be liable for possible minimum wage violations before April 15, 1986 with respect to service deemed by that agency to have been performed for it by a volunteer.

SECTION 5. STATE AND LOCAL LEGISLATIVE EMPLOYEES

This section amends section 3 of the Act to exempt employees of all state and local legislative bodies or branches except library employees.

SECTION 6. EFFECTIVE DATE

The amendments made by this bill will take effect on April 15, 1986 and the Secretary of Labor is required before that date to publish regulations to implement these amendments.

SECTION 7. EFFECT OF AMENDMENTS

This section makes it clear that the bill is neutral with respect to current litigation on the question of whether an employee, or any liability that would exist for violations of the Act regarding non-traditional employees.

SECTION 8. DISCRIMINATION

This section states that an employee who has been discriminated against by an employer because the employee asserted coverage under the overtime provisions of the Act since the *Garcia* decision *may seek relief under section* 15(a)(3) of the Act.

CHANGES MADE IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing laws made by the bill, and/or joint resolution, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in Italic, existing law in which no change is proposed is shown in roman):

FAIR LABOR STANDARDS ACT OF 1938

* * * *

DEFINITIONS

SEC. 3. As used in this Act—

(a) * * *

* * * *

(e)(1) Except as provided in paragraphs (2) [and (3)a], *(3), and (4)*, the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed ~~Forces~~, or

(v) the Library of Congress;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level, [or]

(IV) [who] is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office[.], *or*

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may not volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

* * * *

MAXIMUM HOURS

SEC. 7(a)(1) * * *

* * * *

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate govern-

mental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was

any other work, the employee engaged in such work may accrue not more than 180 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 180 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employer at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate not less than the average regular rate received by such employee during the last 3 years of the employee's employment.

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the term "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours

worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p)(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public

agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who—

(A) is employed by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, and

(B) is employed in fire protection or law enforcement activities (including activities of security personnel in correctional institutions),

agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in such activities, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

• • • •

INVESTIGATIONS, INSPECTIONS, RECORDS, AND HOMEWORK REGULATIONS

SEC. 11. (a) The Secretary of Labor or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Secretary shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the

Secretary shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of state labor laws, the Secretary of Labor may, for the purpose of carrying out his functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such period of time, and shall make such reports therefrom to the Secretary as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder. *The employer of an employee who performs substitute work described in section 7(p)(3) may not be required under this subsection to keep a record of the hours of the substitute work.*

* * * *

APPENDIX G

Senate Report on the Fair Labor Standards Public Employee Overtime Compensation Act; October 17, 1985

Calendar No. 348

99th Congress
1st Session

Report
99-159

SENATE

FAIR LABOR STANDARDS PUBLIC EMPLOYEE OVERTIME COMPENSATION ACT

OCTOBER 17, (legislative day, OCTOBER 15), 1985).—
Ordered to be printed

Mr. HATCH, from the Committee on Labor and Human Resources, submitted the following

REPORT

[To accompany S. 1570]

The Committee on Labor and Human Resources, to which was referred the bill (S. 1570) to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of the Act to volunteers, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended to pass.

CONTENTS

I. Committee Amendment as Reported

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Fair Labor Standards Public Employee Overtime Compensation Act".

SEC. 2. Section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) is amended by adding at the end thereof the following new subsection:

"(o)(1) Employees of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency may receive overtime compensation in the form of compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by subsection (a) of this section pursuant to—

"(A) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representative of such employees; or

"(B) in the case of employees not covered by clause (A), an agreement or understanding arrived at between the employer and employee before the performance of the work.

"(2) In the case of employees described in clause (B) of paragraph (1) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (B).

"(3) In determining eligibility for overtime compensation under this section, compensatory time off taken during any workweek or work period shall not be counted as hours worked during that workweek or work period.

"(4)(A) No overtime compensation in the form of compensatory time off may be accrued by any employee of a public agency that is a State, a political subdivision of a State, or an interstate government agency, in excess of 480 hours for hours worked after April 15, 1986.

"(B) Any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency who has accrued 480 hours of compensatory time off shall, for additional overtime hours of work, receive overtime compensation in accordance with subsection (a) of this section.

"(C) If any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency terminates employment with a particular public agency, the employee shall receive overtime compensation in accordance with the provisions of subsection (a) of this section.

"(D) Any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency who—

"(i) has accrued compensatory time off, and

"(ii) has requested the use of such compensatory time off,

shall be permitted to use such compensatory time off within a reasonable period after the request, if the use of such compensatory time off does not unduly disrupt the operations of the public agency.

"(E) In making a determination under subparagraph (B) or (C) of this paragraph, the rate of compensation of the employee shall be the rate of compensation earned by the employee at the time the employee receives compensation for overtime.".

SEC. 3. Section 7 of the Fair Labor Standards Act of 1938 (as amended by section 2) is amended by adding at the end thereof the following new subsection:

"(p) In determining the hours of employment to which the rate prescribed by subsection (a) of this section applies, the hours worked by an employee of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, may be excluded by the agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section if—

"(1) the hours worked are solely at the employee's option; and

"(2) the hours are worked—

"(A) on an occasional or sporadic part-time basis for such public agency in a different capacity from the capacity in which the employee is primarily employed;

"(B) by any employee engaged in fire protection or law enforcement activities (including security personnel in correctional institutions), on a special detail for a separate and independent employer, if the public agency by whom the employee is employed requires that its fire protection or law enforcement personnel be hired by the separate and independent employer for the work, otherwise facilitates the employment, or affects the condition of employment of employees of the separate and independent employer, or

"(C) by any employee engaged in fire protection or law enforcement activities (including security personnel in correctional institutions), for another employee who was scheduled to work such hours if the employee's have agreed, with the approval of the employer, to substitute scheduled work hours.".

SEC. 4. Section 3(e) of the Fair Labor Standards Act of 1938 is amended—

(1) by striking out "paragraphs (2) and (3)" in paragraph (1) and by inserting in lieu thereof "paragraphs (2), (3), and (4)"; and

(2) by adding at the end thereof the following new paragraph:

"(4)(A) The term 'employee' does not include any individual who is a volunteer for a public agency that is a State, a political subdivision of a State, or in an interstate governmental agency, even if the individual is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteer, except that an individual who is otherwise employed by the same public agency for which the individual volunteered to perform the same type of services is not a volunteer for the purpose of this paragraph.

"(B) The hours in which an employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency performs services on a volunteer basis for a public agency, other than the

public agency which is the employee's employer, shall not be considered hours worked for the principal public agency for purposes of sections 6, 7, and 11 of this Act, even if the principal public agency has an agreement for mutual aid with the agency for which the employee volunteers.".

SEC. 5. Section 3(e)(2)(C)(ii) of the Fair Labor Standards Act of 1938 is amended—

(1) by striking out "or" at the end of division (III);

(2) by striking out "who" in division (IV);

(3) by striking out the period at the end of division (IV) and inserting in lieu thereof a comma and the word "or"; and

(4) by adding at the end thereof the following:

"(V) is an employee of the legislative branch or legislative body of a State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency."

SEC. 6. Notwithstanding the provisions of section 8, an employee of a public agency who asserts rights under the Fair Labor Standards Act of 1938 between February 19, 1985, and April 14, 1986, shall be accorded the same protection against discharge or discrimination as is available under section 15(a)(3) of the Fair Labor Standards Act of 1938.

SEC. 7. (a) The Secretary of Labor shall promulgate regulations to carry out paragraph (4) of section 3(e) of the Fair Labor Standards Act of 1938, as added by section 4 of this Act, by March 15, 1986.

(b) Prior to April 15, 1986, the practice of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency with respect to the

definition of volunteers shall, for the purpose of the amendment made by section 4 of this Act, be controlling.

SEC. 8. (a) Except as provided in subsections (b) and (c) of this section, the amendments made by this Act shall take effect on April 15, 1986.

(b)(1)(A) There shall be no liability under section 16 of the Fair Labor Standards Act of 1938 for any violation arising under sections 7 or 11(c) (as it relates to section 7) of the Fair Labor Standards Act of 1938 occurring prior to April 15, 1986, with respect to any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency who would not have been covered by such Act under the special enforcement policy of the Secretary of Labor concerning States and political subdivisions of States on January 1, 1985.

(B) With respect to any employee described in subparagraph (A) of this paragraph a public agency may defer until August 1, 1986 the payment of overtime compensation under section 7 of the Fair Labor Standards Act of 1938 for overtime hours worked after April 14, 1986.

(2) This Act and the amendments made by this Act shall not affect whether a public agency that is a State, a political subdivision of a State, or an interstate governmental agency is liable under section 16 for a violation of section 6, 7, or 11 of the Fair Labor Standards Act of 1938 occurring prior to April 15, 1986 with respect to any employee of such public agency who would have been covered by the Fair Labor Standards Act of 1938 under the special enforcement policy of the Secretary of Labor concerning States and political subdivisions of States on January 1, 1985.

(3) The amendments made by section 2 of this Act shall apply to any collective bargaining agreement, memorandum of understanding, or other agreement between

the public agency and recognized representative of such employees in effect on the date of enactment of this Act.

(c) The provisions of sections 6 and 7 shall take effect on the date of enactment of this Act.

Amend the title so as to read:

A bill to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of that Act to volunteers, and for other purposes.

II. Summary of the Bill

I. The overtime provisions of the FLSA are modified to make comp time available in lieu of overtime pay for employees of state and local governments.

A. The bill allows employees the opportunity to receive overtime compensation in either of two forms.

B. The bill also allows employers the flexibility to negotiate for a comp time option.

C. The availability of this comp time is subject to certain conditions.

1. Comp time must be pursuant to an agreement between the employer and employee.

2. Comp time must be available at the premium rate of not less than 1½ hours for each hour of overtime worked.

3. An employee may bank up to 48 hours of comp time (i.e. 8 weeks—320 hours—of overtime worked).

4. An employee may use comp time within a reasonable period of requesting its use, so long as the employer's operation is not unduly disrupted.

5. An employee has the right to cash out comp time when leaving his or her job, at the rate of pay received when leaving.

II. The bill provides flexibility for public employers and employees in other areas.

A. Volunteers. A volunteer may receive a nominal fee or reasonable benefit without becoming a paid "employee".

B. Joint Employment. Employees may moonlight on special detail assignments (e.g. police working security at local rock concert) or occasional jobs (e.g. school bus driver refereeing school football games) without having hours counted toward overtime requirements.

III. Effective date: The bill is effective on April 15, 1986 (one year from the mandate in *Garcia*). This deferral enables state and local governments to achieve compliance.

III. Background and Need for Legislation

A. BACKGROUND

Congress enacted the Fair Labor Standards Act (FLSA) in 1938, establishing nationwide minimum wage and maximum hours standards for the first time. The FLSA proclaimed Congress' intent to ensure "the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." Over the years, the Act has been amended and expanded to include coverage of previously excluded groups of workers. The history of the FLSA as applied to state and local government employees involves a number of actions by Congress, the U.S. Department of Labor (DOL), and the U.S. Supreme Court since 1966.

Congressional action

The FLSA provides as a general matter that an employee who is not otherwise exempt from coverage shall be entitled to a federally prescribed minimum wage and to overtime pay on a time-and-one-half basis for all hours worked in excess of 40 in a workweek. It initially applied only to private employers who were directly engaged in

commerce. In 1966, Congress extended the FLSA to cover certain school, hospital, nursing home, and transit employees of state and local government under the Fair Labor Standards Amendments of 1966 (80 Stat. 830). In 1974, Congress further expanded the FLSA to cover all state and local government employees except for a small number who were specifically exempted, when it enacted the Fair Labor Standards Amendments of 1974 (88 Stat. 55). The 1974 amendments also extended coverage of the FLSA to a wide range of Federal employees, including civilian employees of the military departments, employees of agencies of the executive branch, and employees of the U.S. Postal Service. As a result of the 1974 FLSA amendments, the minimum wage provisions of the FLSA (29 U.S.C. 206), which currently require the payment of at least $3.35 per hour to employees, were extended to almost all employees of state and local governments. Similarly, the overtime provisions of the FLSA (29 U.S.C. 207), requiring the payment of overtime at not less than a time and one-half basis for hours worked in a workweek in excess of 40, were extended to these same state and local government employees.

The 1974 amendments included a limited overtime exception for police officers, firefighters, and related employees. (29 U.S.C. 207(k)). Congress established these special provisions in recognition of the special needs of governments in the area of public safety and the unusually long hours that public safety employees must spend on duty. Section 7(k) was intended to alleviate the impact of the FLSA on the fire protection and law enforcement activities of state and local government by providing for work periods of up to 28 days (instead of the usual seven-day workweek), establishing somewhat higher ceilings on the maximum number of hours which could be worked before overtime compensation had to be paid, and providing for a gradual phase-in period. By the end of the phase-in period, the maximum number of

hours for police officers and firefighters was to be the lesser of 216 or the average number of hours of work in tours of duty in work periods of 28 days as determined by DOL in a statutorily mandated study. In 1983, DOL published the final results of its study and established the new hours standards for law enforcement employees at 171 and for fire protection employees at 212 in a 28-day period (48 Fed. Reg. 40,518).

Supreme Court

The 1966 FLSA amendments were challenged on constitutional grounds and upheld by the Supreme Court of *Maryland v. Wirtz*, 392 U.S. 183 (1968). The Supreme Court in *Wirtz* concluded that federal regulation of labor conditions in public schools and hospitals was constitutional under the Commerce Clause and did not unduly interfere with the performance of governmental functions entrusted to the States.

Shortly after enactment of the 1974 FLSA amendments, a number of cities and states challenged the validity of those amendments in Federal court. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Supreme Court overruled *Wirtz* and held that both the 1966 and the 1974 amendments were unconstitutional to the extent that they interfered with the integral or traditional governmental functions of States and their political subdivisions. The Court reasoned in pertinent part:

> These activities [fire prevention, police protection, sanitation, public health, and parks and recreation] are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the

> States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence."

426 U.S. at 851 (footnote and citations omitted)

Under *National League of Cities*, schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation were held to be traditional functions of state and local government and, as such, exempt from the FLSA. On December 21, 1979, DOL issued final regulations defining traditional and nontraditional functions of state and local government for purposes of determining whether the FLSA was applicable. In its regulations, DOL added libraries and museums to the functions originally determined by the Supreme Court to be traditional (29 CFR 775.4). DOL defined local mass transit systems, along with seven other functions, as nontraditional (29 CFR 775.3).

A number of public transit authorities challenged the validity of the DOL determination that provision of local mass transit was a nontraditional governmental function. Ultimately, the Supreme Court in *Garcia* v. *San Antonio Metropolitan Transit Authority* was presented with the question whether that DOL determination was a proper application of the *National League of Cities* doctrine. In 1984, following oral argument, the Court ordered reargument of the Garcia case on the question whether the constitutional principles established by *National League of Cities* should be reconsidered.

On February 19, 1985, the Supreme Court expressly overruled *National League of Cities* in *Garcia* v. *San Antonio Metropolitan Transit Authority*, —— U.S. ——, 105 S.Ct. 1005 (1985), and thereby left the FLSA fully applicable to state and local governments. Reasoning that it had "no license to employ freestanding conceptions

of state sovereignty when measuring Congressional authority under the Commerce clause," the Court described its previously promulgated 'traditional governmental function' test as 'doctrinally barren," and held that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 105 S.Ct. at 1018, 1021.

After enumerating various instances where the states "have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause," the Court observed:

> The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.

105 S.Ct. at 1020.

As a result of the *Garcia* ruling, states and localities are not subject to all FLSA requirements, including the 1971 and 212 maximum hours standard for law enforcement and fire protection employees respectively. On June 14, 1985, DOL announced its enforcement policy, stating that the "Wage and Hour Division will begin conducting FLSA investigations involving activities considered traditional government employment and involving employment in local governments" and "in all such cases will extend" the investigation period back to April 15, 1985. DOL selected April 15 as the effective date on which the Supreme Court's mandate issued in the *Garcia* case. DOL also announced that it would delay enforcement activities until October 15, 1985; this date later was extended to November 1, 1985.

NEED FOR THE BILL

In seeking to guarantee a minimum standard of living for all working Americans, the FLSA has been heralded as one of our most fundamental efforts to direct economic forces into social desirable channels. By 1974, FLSA coverage extended to three-fourths of the nation's employed nonsupervisory labor force; federal, state and local government employees were the only major exceptions. Federal workers now have been protected for more than a decade, but most state and local government employees only became covered as of the Supreme Court's *Garcia* decision in February 1985. The Committee is not retreating from the principles established by Congress in the 1966 and 1974 FSLA amendments. The rights and protections accorded to employees of the Federal government and the private sector also are extended to employees of states and their political subdivisions.

At the same time, it is essential that the particular needs and circumstances of the States and their political subdivisions be carefully weighed and fairly accommodated. As the Supreme Court stated in *Garcia*, "the States occupy a special position in our constitutional system." Under that system, Congress has the responsibility to ensure that federal legislation does not undermine the States' "special position" or "unduly burden the States." In reporting this bill, the Committee seeks to discharge that responsbility and to further the principles of cooperative federalism.

In particular, in the wake of *Garcia*, the States and their political subdivisions have identified several respects in which they would be injured by immediate application of the FLSA. This legislation responds to these concerns by adjusting certain FLSA principles with respect to employees of states and their political subdivisions and by deferring the effective date of certain provisions of the FLSA insofar as they apply to the States and their political subdivisions.

The Committee recognizes that the financial costs of coming into compliance with the FLSA—particularly the overtime provisions of section 1—are a matter of grave concern to many states and localities. We have received extensive testimony on this subject from representatives of state and local governments and organized labor. Although the testimony reflects sharp disagreements as to the nature and context of FLSA compliance costs, the Committee concludes that states and localities required to comply with the FLSA will be forced to assume additional financial responsibilities which in at least some instances could be substantial.

Jurisdictions that had relied for a decade upon the exemptions accorded under *National League of Cities* would be required to meet FLSA standards immediately under *Garcia*. Although many jurisdictions commendably and successfully have undertaken to do so, others have expressed an urgent need for lead-time in which to reorder their budgetary priorities while maintaining fiscal stability. As the Committee did under the 1974 amendments, it has again allowed for lead-time for state and local governmnets to comply with the FLSA requirements.

The Committee also is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements —frequently the result of collective bargaining—reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, we wish to accommodate such arrangements.

IV. History of S. 1570

S. 1570, a bill to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the

application of that Act to volunteers, and for other purposes, was introduced by Senator Nickles on August 1, 1985 and was referred to the Committee on Labor and Human Resources. Subsequently, Senators Nickles and Metzenbaum agreed to an amendment in the nature of a substitute for the original bill. This amendment was accepted by the Committee on Labor and Human Resources on October 8, 1985.

V. Hearings

Public hearings were conducted by the Subcommittee on Labor on July 25 and September 10 in Washington, D.C. A field hearing was held in Oklahoma City, Oklahoma on August 28. The following individuals provided testimony.

JULY 25, 1985

Senator Pete Wilson; California

Congressman John E. Porter; Illinois

Governor John D. Ashcroft; Jefferson City, Missouri

Governor Richard D. Lamm; Denver, Colorado

Governor James G. Martin; Raleigh, North Carolina

Lt. Governor William P. Hobby, Jr.; Austin, Texas

George V. Voinovich, Mayor; Cleveland, Ohio, representing National League of Cities

John E. Bourne, Jr., Mayor; North Charleston, South Carolina, representing U.S. Conference of Mayors

James C. Thomas, President-elect; representing National Association of State Personnel Executives

Senator Joseph W. Harrison, Majority Leader, Indiana Senate; representing National Conference of State Legislatures

Al Bilik, Executive Director, State and Local Division; representing AFL-CIO

Peggy Connerton, Chief Economist; representing Service Employees International Union

Harold A. Schaitberger, Legislative Director; representing International Association of Fire Fighters

Paula Mac Ilwaine, James Hankla, Abraham Aiona; representing National Association of Counties

Frank H. Forbes, Jr.; representing National Public Employer Labor Relations Association/International City Management Association

Herbert R. Hern, President; representing Industrial Employers and Distributors Association

AUGUST 28, 1985

James Hopper, staff member; representing Senator David Boren (D-OK.)

John F. Cantrell, president; representing County Officers and Deputies Association of Oklahoma

Robert H. Gardner; Tulsa Police and Fire Commissioner

Randy Orndorph, president; representing Tulsa Fraternal Order of Police

Paul Abel, Sheriff, Pottawatomie County Sheriff's Department

Ivan Simmons, president; representing Association of County Commissioners of OK.

Rhonda Couch Swagerty, Tahlequah school bus driver

Steven A. Lewis, director, Oklahoma Department of Wildlife Conservation

Captain Larry Owen, administrative assistant to Commissioner Reed; representing Oklahoma Department of Public Safety

Steve Cain, treasurer; representing Fraternal Order of Police, Oklahoma City

Thomas A. Riddle, business agent; representing Professional Fire Fighters of OK.

Carl Weinaug, city manager of Stillwater, OK.

G. Craig Weinaug, city manager of Ardmore, OK.

Robert D. Allen, Oklahoma City Municipal Counselor

Roger F. Cutler, city attorney of Salt Lake City, Utah; representing National Institute of Municipal Law Officers

SEPTEMBER 10, 1985

William E. Brock, Secretary, U.S. Department of Labor

Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division; U.S. Department of Justice

Francis Flaherty, Mayor; Warwick, Rhode Island

Zoe E. Baird, Special Counsel; representing American Public Transit Association

Wayne M. Cook, General Manager, VIA Metropolitan Transit of San Antonio, Texas; representing American Public Transit Association

Elmer Dunaway, Chairman, National Labor Committee; representing Fraternal Order of Police

Edward J. Blaisie, president, Detectives Endowment Association; representing National Association of Police Organizations, Inc.

Michael D. Muth, Legislative Liaison; representing National Troopers Coalition

William C. Summers, Supervising Attorney; representing International Association of Chiefs of Police, Inc.

John B. Stewart, Jr., Chief, Hartford Fire Department; representing Internal Association of Fire Chiefs

James L. Roberts, Jr., Commissioner; Mississippi Department of Public Safety

Roy G. Saunders, President-elect; representing International Association of Auditorium Managers

VI. Committee Views

A. COMP TIME

A new subsection 7(o) is added to the FLSA to allow state and local government employees to be compensated for overtime hours with compensatory time off ("comp time") in lieu of monetary compensation. Hours for comp time granted in lieu of cash must be compensated at the premium rate of not less than one and one-half hours for each hour of overtime work, just as the monetary rate for overtime is calculated at the premium rate of not less than one and one half times the regular rate of pay.

1. Agreement or understanding

The use of comp time in lieu of pay must be pursuant to some form of agreement or understanding between the employer and employee, reached prior to the performance of the work. Where employees have a recognized representative, the agreement or understanding must be between that representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee. The agreement or understanding need not be in writing, but a record of its existence must be kept. An employer need not adopt the same method or procedure when reaching such agreement or understanding with different employees. The agreement or understanding to provide time off as compensation for overtime may take the form of an express condition of employment, so long as (i) the employee knowingly and

voluntarily agrees to it as a condition of employment, and (ii) the employee is informed that the comp time received may be preserved, used, or cashed out consistent with the provisions of this new subsection. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of comp time so long as those provisions do not conflict with this subsection or the remainder of the Act.

In the case of employees who have no recognized representative and were employed prior to April 15, 1986, an employer that has had a regular practice of awarding comp time in lieu of overtime pay shall be deemed to have reached an agreement or understanding with these employees as of April 15, 1986. The Committee does not intend that employers who have had such a regular practice be required to secure an agreement or understanding with each employee employed prior to the effective date of this subsection. If, however, a regular practice of awarding comp time to employees without a recognized representative does not conform to the remaining requirements of this subsection, it must be modified to do so by April 15, 1986. Employers may initiate a regular practice of awarding comp time in lieu of overtime pay between the date of enactment and April 15, 1986, so long as that practice is a regular one and is not intended to avoid or undermine the provisions of this subsection.

2. Preservation, use, and cashing out

The Committee has sought to balance the employee's right to make use of comp time that has been earned and the employer's need for flexibility in operations. An employee may accrue a maximum of 480 hours of comp time. (Hours accrued prior to April 15, 1986 do not count toward this limit). The 480 hour limit represents 320 hours of actual overtime worked times the one and one-half premium rate. Once this limit is reached, an employee either must be paid in cash for some of the accrued hours

or else must use some comp time before any additional overtime hours may be compensated in the form of time off. For example, if an employee with 480 accrued hours received compensation for 30 of these hours, either in the form of cash or time off, the employee may work another 20 hours of overtime and thus accrue 30 hours at the premium rate. But if an employee has accrued 480 hours and then works additional overtime before drawing down that accrued amount, such additional overtime must be compensated in cash. The presence of a limit on the number of accrued hours does not mean that all 480 hours must be accrued before comp time may be used.

Regardless of the number of hours accrued, the employee has the right to be paid for or use accrued comp time subject to this subsection. The right to be paid arises no later than the time of termination from employment. By termination, the Committee intends to include situations in which the employee leaves his job voluntarily (including retirement), is terminated by his employer, or dies. The rate of compensation for cashing out accrued comp time shall be the rate earned by the employee at the time the cashing out takes place. Because an employee's rate of pay is likely to increase over a period of time in most employment situations, it is anticipated that many employers will have a fiscal incentive to allow for the use of accrued comp time. It is understood that an employer may not decrease an employee's rate of pay in order to avoid or undermine the intent of this cash-out provision.

The employee also has the right to use some or all of his accrued comp time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operation. Use of the term "reasonable" is intended to accommodate varying work practices based on the facts and circumstances of each case. When an employer receives such a request for the use of comp time, that request should be honored unless to do

so would be unduly disruptive. By "unduly disruptive", the Committee means something more than mere inconvenience. For example, a request by a snow plow operator in Maine to use 40 hours of comp time in February probably would be unduly disruptive. This would be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June would not be unduly disruptive.

B. JOINT EMPLOYMENT

A new subsection 7(p) is added to the FLSA to address the area of joint employment. Under the FLSA joint employment rule, there are some situations in which an employee who works for two separate employers or in two separate jobs for the same employer has all of his hours worked credited to one employer for purposes of determining overtime liability. The Committee preserves this FLSA protection so as to prevent such abuses as manipulation of job scheduling or rotation of workers to circumvent overtime requirements. At the same time, the Committee recognizes that there are exceptional circumstances for which special provision should be made, as discussed below.

1. Part-time employment in a different capacity

An employee of a state or local government may have the opportunity to work at his or her option on an occasional or sporadic basis in a different capacity from his or her primary employment. A city mail clerk may serve as a referee at a sports event sponsored by the same city. A county bus driver may assist in crowd control at an event such as a winter festival. The Committee does not intend to prohibit these types of practices, as they do not invite overtime abuse. Accordingly, the new subsection allows an employee to undertake such occasional and sporadic employment without regard to the Act's overtime requirements.

2. Special detail work

An employee engaged in public safety is at times offered opportunities to accept optional special detail work for a separate and independent employer on the employee's off-duty time. These special details include the police officer who accepts extra employment from a school board to direct traffic at a football game, or from a promoter to furnish crowd control at a rock concert or convention. Such opportunities may result from a local legal requirement promulgated by the governing body which is also the employee's primary employer. The requirement may specify that a separate and independent employer must hire sworn law enforcement personnel for these functions, pay such personnel through the primary employer's payroll system, or otherwise adjust or alter their ordinary working conditions. Under current FLSA regulations, the "joint employment" rule requires that the hours worked for the "joint employment" rule requires that the hours worked for the separate and independent employer be combined with the hours worked in the employee's primary job in the calculation of overtime. Under this subsection, the joint employment rule would not apply so long as (i) the special detail is worked solely at the employee's option; (ii) the two employers are in fact separate and independent; and (iii) the primary employer requires, facilitates or affects the performance of the work, as set forth in subsection 7(p)(2)(B). For example, a school system's employment of police officers to direct traffic at a football game where local ordinance requires that only sworn police officers be used for such duty and where the work is solely at the option of the police officers would qualify for separate treatment under this exception to the FLSA. By contrast, the assignment of special details of police officers to cover the extra load of police work required by a large convention where that assignment is not solely at the option of these officers would not qualify. This would be true even if the body

holding the convention reimburses the primary employer for the costs of these services.

3. Substitute work hours

Employees engaged in fire protection or law enforcement activities traditionally have been allowed to work for one another, with the approval of their employer, without affecting the computation of overtime for either employee. Current FLSA regulations may raise questions as to the propriety of such a practice. This new subsection would allow one employee in fire protection or law enforcement to substitute and work for another such employee if the substitution was (i) voluntarily undertaken and agreed to by the employees not at the employer's behest, and (ii) approved by the employer. If two employees trade hours pursuant to this subsection, each employee will be credited as if he or she had worked his or her normal work schedule.

EMPLOYEES OF STATE AND LOCAL LEGISLATIVE BODIES

The exemption from the FLSA overtime provisions for employees of a state or local legislative body (section 3(E)(2)(C)(V) is intended to exempt these employees to the same extent as employees of Congress are exempted under section 3(e)(2)(A). Therefore, just as employees of the Library of Congress are not exempt from these provisions neither are employees of a state or local legislative library. Existing law provides a series of exemptions for state and local legislative employees, but questions have been raised as to whether these exemptions are as broad as the Congressional exemption. The purpose of the new provision is to clarify that this now is the case. The provision is not intended to exempt from FLSA overtime coverage employees of school districts or institutions of higher education.

DISCRIMINATION

Although the Act's overtime protections (including the new provisions described above) do not become effective for most state and local employees until April 15, 1986, many such employees asserted a claim to coverage under section 7 of the FLSA on or after February 19, 1985, the date of the *Garcia* decision. The Committee emphasizes that any action taken by public employers to discharge or in any other manner discriminate against employees because they have asserted such a claim is unlawful under section 15(a)(3) of the Act.

VOLUNTEER SERVICES

A new paragraph 3(e)(4) is added to the FLSA to make clear that persons performing volunteer services for state and local governments should not be regarded as "employees" under the statute. The Committee does not intend to discourage or impede volunteer activities undertaken for humanitarian purposes. At the same time, the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to "volunteer."

To this end, the paragraph provides that an individual who performs services on a volunteer basis for a state or local government shall not be deemed an employee for FLSA purposes: even if the individual receives expenses, a nominal fee or reasonable benefits to perform the services. Thus, for example, a volunteer school crossing guard does not become an "employee" because he or she receives a uniform allowance and/or travel expenses. The one exception to this rule is that an individual who is employed by one public agency may not volunteer to provide the same type of services for the same public agency. To illustrate, a nurse employed by a state hospital may not volunteer nursing services at a state-operated health clinic; the nurse may, however perform such services as a volunteer at a county clinic.

The new paragraph further provides that a state or local government employee may perform volunteer services for another public agency without regard to FLSA overtime requirements, even if the two governmental entities have entered into a mutual aid agreement. Thus, where Town A and Town B have entered into a mutual aid agreement, a firefighter employed by Town A who also is a volunteer firefighter for Town B will not have his or her hours of service for Town B count as part of his or her employment with Town A.

The DOL is directed to issue regulations providing further guidance in this area. If, prior to April 15, 1986, a state or local government had a practice of treating certain individuals who performed services as volunteers, these individuals shall be consider volunteers rather than employees until April 15, 1986, for purposes of the FLSA.

EFFECTIVE DATE

The provision reaffirming the prohibition of discrimination against employees who have asserted a claim to coverage takes effect upon enactment. The amendments to section 7 (comp time and joint employment) and section 3 (volunteers and employees of state and local legislative bodies) take effect April 15, 1986 (except that DOL is to promulgate applicable regulations prior to that date). State and local government employers who are engaged in traditional functions as described by DOL at 29 CFR 775.2 and 775.4 (schools, hospitals, fire prevention, police protection, sanitation, public health, parks and recreation, libraries, museums) are therefore exempt from FLSA overtime liability until April 15, 1986. The Committee has deferred application of the FLSA overtime provisions until exactly one year after the mandate in *Garcia* so that state and local governments may make necessary adjustments in their work practices, staffing patterns, and fiscal priorities. Further, because many local governments begin their fiscal years in July, the amendments allow

actual payment of overtime compensation to be delayed until August 1, 1986 without penalty. Liability, however, in all instances will commence on April 15, 1986. The comp time provisions described above also become applicable to existing collective bargaining agreements on that date.

The April 1986 effective date is not intended to encourage public employers to postpone their efforts to comply with FLSA overtime provisions. To the contrary, the Committee lauds those jurisdictions that have taken—and continue to take—positive action to accord employees overtime protection consistent with the FLSA.

Finally, these amendments do not affect whether employees of state and local governments who are engaged in nontraditional functions as defined by the DOL at 29 CFR 775.3—notably local mass transit systems—are covered by the FLSA prior to April 15, 1986. The Committee is aware that the question whether transit employees, prior to the decision in *Garcia*, were entitled to FLSA compensation for overtime hours worked is still being litigated in federal court. The amendments are intended to protect the rights of both sides to resolve their differences through litigation, without taking a position on the matter.

VII. COST ESTIMATES

U. S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 15, 1985.

Hon. ORIN D. HATCH,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1570, the Fair Labor Standards Public Employee Overtime Compensation Act, as ordered reported by the Senate Committee on Labor and Human Resources, October 9, 1985. We estimate that this bill

would have no cost to the federal government, and would result in significant savings for state and local governments.

S. 1570 would amend the Fair Labor Standards Act (FLSA) as it now applies to nonfederal units of government. The bill would allow states and localities to grant employees one and one-half hours of compensatory time off for every hour of overtime worked, in lieu of paying cash premiums for overtime, but would require that employees receive cash compensation for overtime after accumulating 480 hours of compensatory time. Jurisdictions that maintain collective bargaining relationships would be allowed to preserve contract provisions that provide compensatory time for overtime. Public employees would be allowed to use accrued compensatory time within a reasonable amount of time.

S. 1570 would further amend the FLSA to exclude from the calculation of overtime occasional part-time or volunteer work by public employees for different agencies within the same jurisdiction or for a different jurisdiction. Persons working for nonfederal units of government on a voluntary basis and all persons employed by state and local legislative bodies, except employees subject to civil service laws and library personnel, would be exempt from coverage under the FLSA.

Finally, S. 1570 would set April 15, 1986 as the compliance date for applying the FLSA to state and local employees and would allow public employers to delay payments for overtime until August 1, 1986. Any FLSA liability that may exist prior to April 15, 1986 would be eliminated.

CBO estimates that no cost to the federal government would result from enactment of this legislation, because it would not significantly affect the amount of Department of Labor activity in enforcing the FLSA. CBO estimates, however, that S. 1570 would significantly reduce the budget impact of extending the FLSA to state and

local governments, as would be required under the recent Supreme Court decision in the case of *Garcia* v. *San Antonio Metropolitan Transit Authority* (105 S. Ct. 1005, 1985).

CBO has not completed its study of the potential impact of the *Garcia* decision on state and local government budgets. Our preliminary analysis, based on information from over 30 states, communities, and concerned organizations, indicates that full application of the FLSA wage and overtime provisions as required by that decision would result in initial annual compliance costs totalling between $0.5 billion and $1.5 billion nationwide. Such costs would result from compliance with the overtime payment standards and would decrease in subsequent years as public employers renegotiate union contracts and adjust work schedules. This estimate does not include one-time costs that would be incurred to pay for compensatory time accrued after February 15, 1985.

We estimate that the bill would save most of these compliance costs, by delaying compliance with FLSA standards until April 1986, eliminating retroactive liability, and restoring the option of using compensatory time off rather than cash payments for overtime. The costs associated with the *Garcia* decision and the savings resulting from this bill are difficult to estimate with precision because of the scarcity of information regarding a number of key factors. For example, the savings depend greatly on the extent to which public employers are already complying with FLSA standards, and on the extent to which states or communities that are not yet complying might change certain management and scheduling practices in order to reduce overtime hours. However, detailed data on the number of employees who would be affected, the number of overtime hours worked by affected employees, the number of public employees already paid premium wages for overtime, and the extent to which state and local governments could find ways

to adjust work patterns and wages to avoid incurring additional personnel costs are not available on a comprehensive and reliable basis. In addition, the budgetary cost of compensatory time is uncertain, because it would depend on the extent to which government agencies would need to replace employees to maintain a full staffing level. This factor and other personnel and compensation practices vary sharply from community to community, making it difficult to reliably estimate nationwide costs.

We are continuing to collect information on this subject, and will be pleased to provide the Committee with further information as it becomes available.

With best wishes,

Sincerely,

ERIC HANUSHEK
(For Rudolph G. Penner, Director).

VIII. REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 1570 is made.

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

S. 1570 provides rules for compensatory time off in lieu of overtime compensation for certain public agency employees. All such employers and employees are currently covered by the FLSA. According to the U.S. Census Bureau, as of September 1984, there were approximately 13.5 million state and local employees. Of these, the Employment Standards Administration of the U.S. Department of Labor estimates that as of February 19, 1985, the date of the *Garcia* decision, 6.76 million of these state and local employees are subject to the overtime provisions of the FLSA.

B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS, AND BUSINESSES AFFECTED

The exact economic impact associated with this bill is not known. The legislation allows a public agency to give compensatory time off in lieu of overtime pay. If the public agency grants the time off, no additional costs are associated with the bill. On the other hand, if an employee cashes out his or her accrued overtime at termination, the rate of pay at the time of the cash-out is used rather than the rate of pay at the time the overtime is accrued. Thus, if an employee's rate of pay increases over this period of time, the cash-out will cost the employer more than if the money had been paid immediately. The Committee cannot estimate how the new flexibility given to public agencies will be used and thus cannot determine the exact economic impact.

C. IMPACT OF THE ACT ON PERSONAL PRIVACY

This legislation has no impact on personal privacy. Certain record-keeping requirements to calculate overtime hours already are required by FLSA. The changes made by this bill do not have any additional personal privacy implications.

D. ADDITIONAL PAPERWORK, TIME AND COSTS

FLSA requires that overtime must be paid as soon after the regular pay period, normally a seven day period, as is practical. The bill allows, under certain circumstances, for some overtime hours, up to a maximum of 480, to be carried forward without regard to the regular pay period. Thus, some overtime hours will remain on an employer's books for a longer period of time than now is the case. The additional paperwork, time and costs resulting from this longer carry-over period, however, are estimated to be minimal.

IX. Tabulation of Votes Cast in Committee

The motion favorably to report the bill as amended to the Senate was passed unanimously by the Committee.

X. Section-by-Section Analysis

Section 2 adds a new subsection 7(o) to the Fair Labor Standards Act. New section 7(o)(1) provides that employees of a state or local government may receive comp time in lieu of overtime pursuant to a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees or pusurant to an agreement or understanding between the employer and employee before the performance of the work.

New section 7(o)(2) provides that for employees hired prior to April 15, 1986, a regular practice of providing comp time in lieu of overtime that is in effect on April 15, 1986 shall constitute such agreement or understanding.

New section 7(o)(3) states that comp time taken during any work week or period shall not be counted as hours worked during that work week or period.

New section 7(o)(4) provides that overtime compensation in the form of comp time may not be accrued by any employee in excess of 480 hours for hours worked after April 15, 1986. If the accrued hours do exceed 480 hours, or if the employee terminates employment, such employee must receive overtime compensation in accordance with section 7(a) of the FLSA. Further, an employee who has accrued comp time and required its use shall be permitted such use within a reasonable period of time as long as such use does not unduly disrupt the public agency's operations. Finally, if an employee receives cash for any accrued comp time, the hourly rate for the determination of the amount of cash to be received shall be the hourly rate such employer is receiving on the date of the cash-out.

Section 3 adds a new section 7(p) to the FLSA. An exclusion from the hours worked by an employee is provided for three circumstances, each of which requires that the hours worked are solely at

[illegible]

time work for a public agency in a different capacity from the capacity in which the employee is primarily employed. Second, an employee engaged in fire protection or law enforcement activities may work on a special detail for a separate and independent employer without having such hours count toward overtime if certain conditions are met. Finally, employees engaged in fire protection or law enforcement activities may trade hours, if such employees agree and the employer approves.

Section 4 amends setcion 3(e) of the FLSA by adding a new paragraph (4) which excludes from the definition of the term "employee" any individual who is a volunteer for a public agency even if such individual is paid expenses, reasonable benefits, or a nomianl fee, unless such individual is otherwise employed by the same public agency for which the individual volunteered to perform the same type of services. Further, the hours in which an employee of a public agency performs services on volunteer basis for a public agency other than the employee's employer shall not be considered as hours worked for FLSA purposes even if the employing public agency has an agreement for mutual aid with the agency for which the employee volunteers.

Section 5 amends section 3(e)(2)(C)(ii) of the FLSA and excludes from FLSA coverage an employee of the legislative branch or body of a state, political subdivision or agency, as long as such individual is not employed by the legislative library of such state, political subdivision, or agency.

Section 6 provides, that notwithstanding section 8, any employee of a public agency who asserts rights under the FLSA between February 19, 1985 and April 14, 1986

shall be accorded the same protections otherwise available under section 15(a)(3) of the FLSA.

Section 7 directs the Secretary of Labor, by March 15, 1986, to promulgate regulations on the new "volunteer" language added by section 4. Prior to such date, the practice of a public agency with respect to the definition of "volunteers" shall be controlling.

Section 8 contains the effective dates. The general rule in section 8(a) is that the effective date is April 15, 1986. Section 8(b)(1)(A) provides that there is no liability under section 16 of the FLSA for any violations arising under sections 7 or 11(c) of the FLSA occurring prior to April 15, 1986 for any employee of a public agency who would not have been covered by the FLSA under the special enforcement policy of the Secretary of Labor concerning States and political subdivisions on January 14, 1986. Section 8(b)(1)(B) provides that cetrain public agencies may defer payment of overtime compensation until August 1, 1986 for overtime hours worked after April 14, 1986.

Section 8(b)(2) provides that this Act and the amendments made by this Act shall not affect whether a public agency is liable under section 16 for a violation of section 6, 7, or 11 of the FLSA occurring prior to April 15, 1986 with respect to any employee of such public agency who would have been covered by the FLSA under the special enforcement policy of the Secretary of Labor concerning states and political subdivisions on January 1, 1985.

Section 8(b)(3) provides that the amendments contained in section 2 shall apply to any collective bargaining agreement, memorandum of understanding, or other agreement between the public agency and recognized representative of such employees in effect on the date of enactment.

Section 8(c) provides that sections 6 and 7 shall take effect on the date of enactment.

XI. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

Fair Labor Standards Act of 1938

AN ACT To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938."

SEC. 2. * * *

DEFINITIONS

SEC. 3. As used in this Act

(a)(d) * * *

(e)(1) Except as provided in [paragraphs (2) and (3)] *paragraphs (2), (3), and (4)*, the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(v) in the Library of Congress;

(B) any individual employed by the United Sttaes Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level, **[**or**]**

(IV) **[**who**]** is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office **[**.**]**, *or*

(V) is an employee of the legislative branch or legislative body of a State,

political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (n), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who is a volunteer for a public agency that is a State, a political subdivision of a State, or an interstate governmental agency, even if the individual is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered, except that an individual who is otherwise employed by the same public agency for which the individual volunteered to perform the same type of services is not a volunteer for the purpose of this paragraph.

(B) The hours in which an employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency performs services on a volunteer basis for a public agency, other than the public agency which is the employee's employer, shall not be considered hours worked for the principal public agency for purposes of sections 6, 7, and 11 of this Act, even if the principal public agency has an agreement for mutual aid with the agency for which the employee volunteers.

SECS. 5-6. * * *

MAXIMUM HOURS

SEC. 7.

(a)-(n) * * *

(o)(1) Employees of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency may receive overtime compensation in the form of compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by subsection (a) of this section pursuant to—

(A) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representative of such employees; or

(B) in the case of employees not covered by clause (A), an agreement or understanding arrived at between the employer and employee before the performance of the work.

(2) In the case of employees described in clause (B) of paragraph (1) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (B).

(3) In determining eligibility for overtime compensation under this section, compensatory time off taken during any workweek or work period shall not be counted as hours worked during that workweek or work period.

(4)(A) No overtime compensation in the form of compensatory time off may be accrued by any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency, in excess of 480 hours for hours worked after April 15, 1986.

(B) Any employee of a public agency that is a State, a political subdivision of a State, or an

interstate governmental agency who has accrued 480 hours of compensatory time off shall, for additional overtime hours of work, receive overtime compensation in accordance with subsection (a) of this section.

(C) If any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency terminates employment with a particular public agency, the employee shall receive overtime compensation in accordance with the provisions of subsection (a) of this section.

(D) Any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency who—

(i) has accrued compensatory time off, and

(ii) has requested the use of such compensatory time off,

(shall be permitted to use such compensatory time off within a reasonable period after the request, if the use of such compensatory time does not unduly disrupt the operations of the public agency.

(E) In making a determination under subparagraph (B) or (C) of this paragraph, the rate of compensation of the employee shall be the rate of compensation earned by the employee at the time the employee receives compensation for overtime.

(p) In determining the hours of employment to which the rate prescribed by subsection (a) of this section applies, the hours worked by an employee of a public agency which is a State, a political subdivision of a State, or an interstate governmental

agency, may be excluded by the agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section if—

(1) the hours worked are solely at the employee's option; and

(2) the hours are worked—

(A) on an occasional or sporadic part-time basis for such public agency in a different capacity from the capacity in which the employee is primarily employed;

(B) by any employee engaged in fire protection or law enforcement activities (including security personnel in correctional institutions), on a special detail for a separate and independent employer, if the public agency by whom the employee is employed requires that its fire protection or law enforcement personnel be hired by the separate and independent employer; or
separate and independent employer for the work, otherwise facilitates the employment, or affects the conditions of employment of employees of the separate and independent employer; or

(C) by any employee engaged in fire protection or law enforcement activities (including security personnel in correctional institutions), for another employee who was scheduled to work such hours if the employees have agreed, with the approval of the employer, to substitute scheduled work hours.

SECS. 8-19 * * *

APPENDIX H

Conference report on the Fair Labor Standards Amendments of 1985; November 1, 1985

99th Congress, 1st Session — HOUSE OF REPRESENTATIVES — Report 99-357

FAIR LABOR STANDARDS AMENDMENTS OF 1985

NOVEMBER 1, 1985.—Ordered to be printed

Mr. HAWKINS, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 1570]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1570) to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of that Act to volunteers, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

Short Title; Reference to Act

Section 1. (a) Short Title.—This Act may be cited as the "Fair Labor Standards Amendments of 1985".

(b) Reference to Act.—Whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be a reference to a section or other provision of the Fair Labor Standards Act of 1938.

Compensatory Time

Sec. 2. (a) Compensatory Time.—Section 7 (29 U.S.C. 207) is amended by adding at the end the following:

"(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

"(2) A public agency may provide compensatory time under paragraph (1) only—

"(A) pursuant to—

"(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

"(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

"(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed in paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

"(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

"(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

"(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

"(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

"(B) the final regular rate received by such employee,

whichever is higher.

"(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

"(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

"(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

"(6) For purposes of this subsection—

"(A) the term 'overtime compensation' means the compensation required by subsection (a), and

"(B) the terms 'compensatory time' and 'compensatory time off' mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate."

(b) Existing Collective Bargaining Agreements.—A collective bargaining agreement which is in effect on April 15, 1986, and which permits compensatory time off in lieu of overtime compensation shall remain in effect until its expiration date unless otherwise modified, except that compensatory time shall be provided after April 14, 1986, in accordance with section 7(o) of the Fair Labor Standards Act of 1938 (as added by subsection (a)).

(c) Liability and Deferred Payment.—(1) No State, political subdivision of a State, or interstate governmental agency shall be liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6 (in the case of a territory or possession of the United States),

7, or 11(c) (as it relates to section 7) of such Act occurring before April 15, 1986, with respect to any employee of the State, political subdivision, or agency who would not have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in sections 775.2 and 775.4 of title 29 of the Code of Federal Regulations.

(2) A State, political subdivision of a State, or interstate governmental agency may defer until August 1, 1986, the payment of monetary overtime compensation under section 7 of the Fair Labor Standards Act of 1938 for hours worked after April 14, 1986.

Special Details, Occasional or Sporadic Employment, and Substitution

Sec. 3 (a) Special Detail Work for Fire Protection and Law Enforcement Employees.—Section 7 (29 U.S.C. 207) is amended by adding after subsection (o) (added by section 2) the following:

"(p)(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

"(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail.

"(B) facilitates the employment of such employees by a separate and independent employer, or

"(C) otherwise affects the condition of employment of such employees by a separate tnd independent employer.".

(b) Occasional or Sporadic Employment.—Section 7(p) (29 U.S.C. 207), as added by subsection (a), is amended by adding at the end the following:

"(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.".

(c) Substitution.—(1) Section 7(p) (29 U.S.C. 207), as amended by subsection (b), is amended by adding at the end the following:

"(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.".

(2) Section 11(c) (29 U.S.C. 211(c)) is amended by adding at the end the following: "The employer of an

employee who performs substitute work described in section 7(p)(3) may not be required under this subsection to keep a record of the hours of the substitute work.".

Volunteers

Sec. 4. (a) Definition.—Section 3(e) (29 U.S.C. 203(e)) is amended—

"(1) by striking out "paragraphs (2) and (3)" in paragraph (1) and inserting in lieu thereof "paragraphs (2), (3), and (4)", and

(2) by adding at the end the following:

"(4)(A) The term 'employee' does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

"(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

"(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.".

(b) Regulations.—Not later than March 15, 1986, the Secretary of Labor shall issue regulations to carry out paragraph (4) of section (3)(e) (as amended by subsection (a) of this section).

(c) Current Practice.—If, before April 15, 1986, the practice of a public agency was to treat certain individuals as volunteers, such individuals shall until April 15, 1986,

be considered, for purposes of the Fair Labor Standards Act of 1938, as volunteers and not as employees. No public agency which is a State, a political subdivision of a State, or an interstate governmental agency shall be liable for a violation of section 6 occurring before April 15, 1986, with respect to services deemed by that agency to have been performed for it by an individual on a voluntary basis.

State and Local Legislative Employees

Sec. 5. Clause (ii) of section 3(e)(2)(C)) (29 U.S.C. 203(e)(2)(C)) is amended—

(1) by striking out "or" at the end of subclause (III),

(2) by striking out "who" in subclause (IV),

(3) by striking out the period at the end of subclause (IV) and inserting in lieu thereof ", or", and

(4) by adding after subclause (IV) the following:

"(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.".

Effective Date

Sec. 6. The amendments made by this Act shall take effect April 15, 1986. The Secretary of Labor shall before such date promulgate such regulations as may be required to implement such amendments.

Effect of Amendments

Sec. 7. The amendments made by this Act shall not affect whether a public agency which is a State, political subdivision of a State, or an interstate governmental agency is liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6, 7, or 11 of such Act occurring before April 15, 1986, with respect to

any employee of such public agency who would have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in section 775.3 of title 29 of the Code of Federal Regulations.

Discrimination

Sec. 8. A public agency which is a State, political subdivision of a State, or an interstate governmental agency and which discriminates or has discriminated against an employee with respect to the employee's wages or other terms or conditions of employment because on or after February 19, 1985, the employee asserted coverage under section 7 of the Fair Labor Standards Act of 1938 shall be held to have violated section 15(a)(3) of such Act. The protection against discrimination afforded by the preceding sentence shall be available after August 1, 1986, only for an employee who takes an action described in section 15(a)(3) of such Act.

And the House agree to the same.

That the Senate recede from its disagreement to the amendment of the House to the title of the bill and agree to the same.

AUGUSTUS F. HAWKINS,
AUSTIN J. MURPHY,
W.L. CLAY,
PAT WILLIAMS
JAMES M. JEFFORDS,
TOM PETRI,
STEVE BARTLETT,
Managers on the Part of the House.

ORRIN G. HATCH,
DON NICKLES,
ROBERT T. STAFFORD,
HOWARD M. METZENBAUM,
EDWARD M. KENNEDY,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1570) to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of that Act to volunteers, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

PAYMENT FOR COMPENSATORY TIME UPON TERMINATION OF EMPLOYMENT

The Senate bill provides that upon termination of employment an employee shall be paid for unused compensatory time at the final regular rate received by such employee.

The House amendment provided that payment for unused compensatory time is to be at a rate not less than the average regular rate received by an employee during the last 3 years of the employee's employment.

The conference substitute combines the Senate and House provisions to provide that payment for unused compensatory time is to be at a rate not less than—

(1) the average regular rate received by an employee during the last 3 years of the employee's employment, or

(2) the final regular rate received by an employee, whichever is higher.

SCOPE OF SUBSTITUTION RULE

Under the Senate bill the rules for the treatment of hours of substitute employment apply to employees of a public agency engaged in the same activity.

Under the House amendment the rules for the treatment of hours of substitute employment apply only to employees engaged in fire protection or law enforcement activities (including activities of security personnel in correctional institutions).

The conference substitute is the same as the Senate bill.

COMPENSATORY TIME LIMIT

Under the Senate bill an employee may not accrue more than 480 hours of compensatory time.

Under the House amendment if the work of an employee included work in a public safety activity, an emergency response activity, or a seasonal activity the employee may accrue not more than 480 hours of compensatory time. An employee engaged in any other work may accrue not more than 180 hours of compensatory time.

The conference substitute provides that if the work of an employee included work in a public safety activity, an emergency response activity, or a seasonal activity the employee may accrue not more than 480 hours of compensatory time. An employee engaged in any other work

may accrue not more than 240 hours of compensatory time.

SCOPE OF PROTECTION AGAINST DISCRIMINATION

The Senate bill prohibits discrimination as defined by section 15(a)(3) of the Fair Labor Standards Act of 1938.

The House amendment prohibits discrimination with respect to wages or other terms or conditions of employment.

The conference substitute adopts the House amendment with the following understandings as to the scope of protection provided by the House amendment:

The antidiscrimination provision is meant to apply where one or more employees are singled out for adverse treatment in retaliation for an assertion that they are covered by the overtime provisions of the FLSA. The provision also is intended to apply where an employer's response to the assertion of FLSA coverage is to reduce wages or other monetary benefits for an entire unit of employees. In either instance, the actual victims of discrimination must show that coverage was asserted and they also must show actual discrimination, i.e., that the employer's action constituted retaliation for the employee or employees' assertion of coverage and avoidance of the asserted protections of Federal law. If a court so finds, that conduct would be unlawful under section 8.

An employer's adjustment of work schedules to reduce overtime hours would not constitute discrimination under this provision so long as it was not undertaken to retaliate for an assertion of coverage. Such an adjustment is permissible under the Act but it does not supersede applicable requirements of State law or a collective bargaining agreement.

An employer who, after February 19, 1985, paid cash overtime at a time and one-half rate pursuant to the

FLSA may not recoup these overtime payments from his employees by whatever means without violating section 8. State and local government employers are in no way obligated to comply with the Act's overtime provisions prior to April 15, 1986. But as stated in both Committee reports, nothing in this legislation, particularly the deferred effective date, is intended to encourage employers to postpone efforts to comply with the Act. Permitting employers who have voluntarily complied prior to April 1986 to negate their past compliance effort at some future date by recapturing from their employees payments already made would have precisely the effect that we intended to foreclose. Such permission also would allow unscrupulous employers to use the threat of recoupment to pressure or otherwise manipulate employees. Section 8 was meant to prohibit such retributive action.

A unilateral reduction of regular pay or fringe benefits that is intended to nullify this legislative application of overtime compensation to State and local government employees is unlawful. Any other conclusion would in effect invite public employers to reduce regular rates of pay shortly after the date of enactment so as to negate the premium compensation mandated by this legislation. The compensatory time and deferred effective date provision of these amendments are to relieve the economic impact of having to comply with the FLSA's premium rate requirements for overtime. Having provided for this relief, we agreed to preserve the same premium rate requirement that has been a part of the FLSA for nearly 50 years. We did not, at the same time, authorize employers to undermine that premium rate with impunity. In what we view as analogous circumstances, DOL regulations explicitly condemn employer efforts to adjust or recalculate regular rates of pay so as to evade the overtime requirements of the Act. (29 CFR 778.500).

This provision is not intended to prohibit State or local government employers from adjusting rates of pay

at some later point in response to fiscal concerns not directly attributable to the impact of extending FLSA coverage to their employees.

This provision is intended to remain neutral with respect to any action by employees challenging the lawfulness of an employer's unilateral reduction of regular pay or fringe benefits instituted prior to enactment of these amendments.

TIME LIMIT ON PROTECTION AGAINST DISCRIMINATION

Section 8 of the Senate bill limits the protection against discrimination to the period February 19, 1985, through April 15, 1986.

Under section 8 of the House amendment the protection against discrimination is limited to on or after February 19, 1985.

The conference substitute is the same as the House amendment with one modification. After August 1, 1986, an employee must assert coverage pursuant to section 15(a)(3) of the Act in order to be entitled to the protection against discrimination provided by the House amendment.

LIABILITY OF TERRITORIES AND POSSESSIONS FOR VIOLATIONS OF SECTION 6

Under the Senate bill and the House amendment public agencies are shielded from liability for violations of section 7 of the FLSA which occur before the effective date, April 15, 1986. The conference substitute provides the same shield with regard to violations of section 6 of the FLSA for territories and possessions of the United States.

AUGUSTUS F. HAWKINS,
AUSTIN J. MURPHY,
W.L. CLAY,
PAT WILLIAMS,
JAMES M. JEFFORDS,
TOM PETRI,
STEVE BARTLETT,
Managers on the Part of the House.

ORRIN G. HATCH,
DON NICKLES,
ROBERT T. STAFFORD,
HOWARD M. METZENBAUM,
EDWARD M. KENNEDY,
Managers on the Part of the Senate.

APPENDIX I

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
9-34BA Rayburn House Office Building
Washington, D.C. 20515

SUBCOMMITTEE ON LABOR STANDARDS

September 26, 1986

Honorable William E. Brock
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Dear Mr. Secretary:

As primary sponsors and conferees on the Fair Labor Standards Amendments of 1985 (PL 99-150), we are very interested in the implementation and administration of those amendments. We believe that proper implementation of the amendments is essential to state and local governmental operations and public employees generally. During consideration of the amendments, the Congress was able to achieve a compromise on state and local government Fair Labor Standards Act (FLSA) provisions of the amendments that was fully supported by both public sector management and labor. It is important that this careful balance of labor and management support be preserved during the development and implementation of the Department of Labor (DOL) regulations currently under consideration.

The DOL published proposed regulations pursuant to the amendment on April 18, 1986 in *Federal Register* No. 75 (29 CFR Part 553). We understand that the Department is currently reviewing the comments received in response to the proposed regulations, and may be issuing final regulations in the near future. In these

circumstances, we are particularly concerned about an issue that has come to our attention and we feel merits your attention.

Section 2 of the 1985 Amendments provides that state and local governments may use compensatory time in lieu of cash payment for overtime only after certain conditions are met. Among those conditions is the agreement of representatives of the employees involved where such employees have designated a representative. (See FLSA Section 7(o)(2)(A)(i), as added by Section 2(a) of the 1985 Amendments.) We were careful in developing the amendment to be clear that the representative need not be a formally recognized collective bargaining representative and that recognition by the employer was not required. Section 553.23(b) of the proposed regulations also is clear, stating that:

> "In the absence of a collective bargaining agreement applicable to the employees, the representative need not be at formal or recognized bargaining agent as long as the representative is designated by the employees."

It is the employees' designation, and not the employer's recognition or attitude toward that representative, that is vital. FLSA Section 7(o)(2)(A)(i) was specifically drafted to avoid any requirement of formal recognition. During the consideration of the legislation, specific references were made to a number of states where NLRA collective bargaining style recognition does not exist; but where large numbers of fire, police, and general public employees belong to labor organizations. We intended the FLSA requirement of an agreement on compensatory time to apply in those situations.

Finally, we understand that some employers or employer representatives may have suggested that the final paragraph following the new FLSA Section 7(o)(2)(B) was intended to provide that the Section (A)(i) requirement of an agreement with the employee representative is not applicable to situations where a regular compensa-

tory time practice was in effect on April 15, 1986. As is clear from the express language of that paragraph, the rule with regard to practices in effect on April 15, 1986, applies *only* to Section (A)(ii) situations in which no representative is involved.

The current proposed regulations properly reflect the language and intent of the new law. If the Department knows of any situation in which employers have asserted that compensatory time is legal without an agreement with a designated employee representative, even where such a representative has requested an opportunity to meet, discuss and agree to the terms of a compensatory time system, the regulations should clearly state that such assertions are inconsistent with the law.

Very truly yours,

/s/ Austin J. Murphy
AUSTIN J. MURPHY
Chairman
Subcommittee on Labor Standards

/s/ Augustus F. Hawkins
AUGUSTUS F. HAWKINS
Chairman
Committee on Education and Labor

/s/ Jim Jeffords
JAMES M. JEFFORDS
Ranking Minority Member
Committee on Education and Labor

/s/ Bill Clay
WILLIAM L. CLAY
Majority Member
Subcommittee on Labor Standards

/s/ Pat Williams
PAT WILLIAMS
Majority Member
Subcommittee on Labor Standards

/s/ Howard M. Metzenbaum
HOWARD METZENBAUM
Ranking Minority Member
Subcommittee on Labor

/s/ Edward M. Kennedy
EDWARD M. KENNEDY
Ranking Minority Member
Committee on Labor and Human Resources

/s/ Robert T. Stafford
ROBERT T. STAFFORD
Ranking Majority Member
Committee on Labor and Human Resources

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89-2388

MARVIN O. WILSON, JR., JOHN A. AUTEN, III, TERRY L. AUSTIN, PHILLIP A. JOHNSTON, WENDELL M. JOLLY, JR., SEBRON L. THOMPSON, HARVEY W. JAMES, JR., ROBERT L. HONEYCUTT, HOWARD DARRELL KEY, THOMAS RICHARD CRAFT, STEVEN L. RIDGE, OSCAR WILLIAM WHITE, BILLY WAYNE OLIVER, HARRY A. ROGERS, DICK NEWHOUSE, TOMMY R. WILBURN, CHARLES E. MELTON, LARRY G. METTS, CLAY E. MORRIS, TRAC L. MORRIS, DAVID G. CHARLES, JOHN A. AUTEN, IV, DAVID J. BLACK, E.E. CHRISTENBURY, CHARLES ALEXANDER ROSEBUROUGH, CARVIE E. WOODARD, GEORGE LEE WHITE, K.R. BLAKE, S.D. SPEAKS, J.M. CLAMPITT, WILLIAM T. HONEYCUTT, BARRY L. BOYD, DARRELL E. FURR, JEROME MARTIN FREDERICK, JAMES C. GEER, J.L. NEWELL, PHILLIP E. CHILES, BEN RAY NORWOOD, THERESA R. ALEXANDER, WARD S. HOWIE, FRANK E. REID, MICHAEL T. CARLETON, CONNIE WILLIAM MORGAN, WILLIAM A. STRAIN, MICHAEL J. CORIGLIANO, MELVIN D. BALLES, SCOTT A. DAWKINS, DAVID LEE NEWELL, MICHAEL SPATH, WILLIAM F. LOWE, T.A. MCKENZIE, DONALD W. TAYLOR, GARY LEE ISENHOUR, FRANK S. PRESSLEY, WILLIAM D. HENDERSON, DANNY JACK PHARR, DAVID EUGENE SCOTT, TOM C. HARLLEE, PATRICK F. STARNES, CLIFTON M. MULLIS, VINCENT T. SEVERN, DAVID K. LEDBETTER, FREDERICK O. SMITH, JERRY A. RODGERS, WILLIAM F. FREEMAN, ELI J. ROBLES, JAMES F. ELLIS, D.L. GHORLEY, D.C. NANCE, L.E. BLACK, J.C. BLACK, D.W. STEPHENS, C.D. GASKIN, J.D. BAREFOOT, D.C. MOORE, CHRISTOPHER D. GORDON, JAMES ROBERT SHAFFNER, GARRY E. MCCORMICK, RICHARD L. ALBAUGH, MICHAEL E. SAYE, ROBERT W.

McDONALD, RONALD LEON SHUMAKER, LEVI V. STEELE, DOYLE NEAL, FRED B. ARCHIE, DARRELL R. COLLINS, JACKIE C. CRESS, WILLIAM R. BROWN, SR., JEFFREY L. CAMPBELL, THOMAS A. DAVIS, RANDY P. MOWREY, J. MICHAEL KEFFER, CALVIN L. FINK, JOHN A. HAWLEY, JR., PHYLLIS S. BOST, WILLIAM R. SUMMEY, GEORGE BAXTER HOLMES, JAMES GREG TAYLOR, ROBERT WILLIAM KENNARD, GARY WAYNE WORKMAN, REX DONALD HOVEY, WILLIAM MICHAEL STEGALL, DONALD PARKS POPLIN, JAMES DAVID THOMAS, JAMES LOUIS BRADFORD, RONALD LEE SMITH, JERRY LYNN SHOPE, JERRY W. KILLIAN, BLAIR D. CARR, II, ANDREW PRESTON OSBORNE, SUE N. TARANTINO, R.L. PHARR, GARY MILLER, ROY KENNETH BRADLEY, ALLEN KEITH MIDDLETON, THOMAS WAYNE HELMS, LARRY MALBOURNE KEPLEY, JR., ROBERT J. BRISHEY, JOHNNY E. WILEY, LINDSAY D. KEITH, EDWARD WAYNE MURRAY, WALTER CLINTON CALDWELL, JR., SHARON BEAL BLACK, HOMER LARRY HOLTZCLAW, WILLIAM DUNCAN LOVE, VAN W. SULLIVAN, EVERETTE A. PASSALY, JR., CHARLES E. JARRELL, BARRY L. BROWN, WILLIAM B. COCHRAN, NATHAN DOUGLAS HOOKS, GRAYLEN D. HARE, STEPHEN S. BROTHERTON, TOMMY CURTIS LINK, CORNICE ALTON BUTLER, EDWARD ROGERS FUNDERBURK, JACK TIMOTHY GETTIS, ANTHONY DWAYNE MCWHIRTER, EUGENE PERRY FORTE, BOBBY W. DAVIS, KENNETH D. CRUMP, WALTER RANDY KINSEY, ALAN S. HOFFMAN, GEORGE RICHARD PARSLEY, DONALD CECIL MULL, ROY STUART SMITH, III, ANDREW REID PICKENS, ALFRED ALLEN DAVIS, JASON WILLIAM BOYD, JOHN LEE CAROTHERS, MOSES DAVID, RAYMOND HUGH THROWER, FRANKIE WAYNE GREER, DAVID ROE LANE, JR., LYNN CHANDLER, FRANCIS MARION MCGOWAN,

Plaintiffs-Appellees,

v.

CITY OF CHARLOTTE, NC,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte

Robert D. Potter, District Judge

(CA-88-79-C-C-P)

Argued: December 3, 1991

Decided: May 8, 1992*

Before ERVIN, Chief Judge, and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, WILKINSON, WILKINS, NIEMEYER, HAMILTON and LUTTIG, Circuit Judges.

Reversed and remanded by published opinion. Judge Wilkins wrote the majority opinion, in which Judges Russell, Widener, Wilkinson, Niemeyer, and Hamilton joined. Judge Luttig wrote a concurring opinion. Chief Judge Ervin wrote a dissenting opinion, in which Judges Hall, Phillips, Murnaghan, and Sprouse joined.

COUNSEL

ARGUED: Freeman Douglas Canty, OFFICE OF THE CITY ATTORNEY, Charlotte, North Carolina, for Appellant. Thomas Aquinas Woodley, MULHOLLAND & HICKEY, Washington, D.C., for Appellees. *ON BRIEF:* Gregory K. McGillivary, MULHOLLAND & HICKEY, Washington, D.C., for Appellees.

OPINION

WILKINS, Circuit Judge:

The City of Charlotte appeals the order of the district court granting summary judgment in favor of 156 in-

---

* The opinion originally filed May 8, 1992, has been changed only by insertion of the correct version of Chief Judge Ervin's dissenting opinion.

dividual Charlotte fire fighters (collectively, the "Fire Fighters") on their claim that the City violated section 7(o) of the Fair Labor Standards Act, 29 U.S.C.A. § 207(o) (West Supp. 1991). After oral argument before a panel, rehearing was ordered before this court sitting en banc. We now reverse the grant of summary judgment.

I.

Appellee Marvin O. Wilson, Jr., president of the Charlotte Fire Fighters Association Local 660, dispatched a letter dated December 3, 1985 to Fire Chief R. L. Blackwelder challenging the City's practice of awarding Fire Fighters compensatory time instead of cash payment for overtime hours worked. In his letter, Wilson referred to recently enacted amendments to the Fair Labor Standards Act and asserted that under newly added section 7(o) the City could not provide compensatory time in lieu of cash payment for overtime without first reaching an agreement with the representative of the Fire Fighters. He notified Chief Blackwelder that he and 155 other Fire Fighters had selected Local 660 of the International Association of Fire Fighters as their representative under subsection 7(o)(2)(A)(i) and that, absent an appropriate agreement under this section, the City was required to pay cash for all overtime work. Chief Blackwelder refused to bargain with Local 660 because North Carolina law prohibited contracts between governmental units and labor unions. The Fire Fighters instituted this action in February 1988, claiming that the compensatory time policy violated section 7(o) of the Act because the City refused to recognize and negotiate with Local 660 as the Fire Fighters' designated representative. They sought a monetary award in the form of liquidated damages equal to their accrued unpaid compensation for overtime. Granting the Fire Fighters' motion for partial summary judgment, the district court held that the City was obligated to enter into an agreement with the Fire Fighters'

designated representative in order to provide compensatory time.

II.

As originally enacted, the Fair Labor Standards Act was not applicable to state or local public employers. Although Congress attempted to subject state and local governmental employers to the minimum wage and overtime requirements of the Act, the Supreme Court held that these requirements were not enforceable against public employers when traditional governmental functions were involved. *National League of Cities v. Usery*, 426 U.S. 833 (1976). In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court overruled *National League of Cities* and held that employees of a municipal transit authority were entitled to the protection afforded by the minimum wage and overtime requirements of the Act. *Id.* at 554-57.

In response to the *Garcia* decision, Congress amended provisions of the Act applicable to state and local public agencies in order to align the statutory scheme with the recent decision and to prevent undue hardship to public employers resulting from the financial burden of paying cash overtime compensation to public employees. *See* S. Rep. No. 159, 99th Cong., 1st Sess. 7-8 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 655. These amendments included the addition of section 7(o) that provides in pertinent part:

> (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . .

(B) . . . .

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

29 U.S.C.A. § 207(o).

Following the addition of section 7(o) to the Act, a public employer who wishes to provide compensatory time off in lieu of monetary compensation for overtime work to its employees has several courses of action available. Pursuant to subsection 7(o)(2)(A)(i), it may reach an agreement with a representative of its employees. 29 U.S.C.A. § 207(o)(2)(A)(i). If an agreement is not reached with the employees' representative, a public employer may enter into an agreement with individual employees. 29 U.S.C.A. § 207(o)(2)(A)(ii); *Dillard v. Harris*, 885 F.2d 1549, 1552 (11th Cir. 1989) (finding that, within the meaning of subsection (ii), employees are not "covered by" subsection (i) unless an agreement

has been reached with the employees' representative), *cert. denied*, 111 S. Ct. 210 (1990); *but see International Ass'n of Fire Fighters, Local 2203 v. West Adams County Fire Protection Dist.*, 877 F.2d 814 (10th Cir. 1989) (holding public agency may not reach agreement with individual employees if those employees have designated a representative). In the absence of an agreement, and subject to the exception for employees hired prior to April 15, 1986, the Act mandates that a public employer compensate its employees for overtime work with monetary payments. 29 U.S.C.A. § 207(o); *Dillard*, 885 F.2d at 1556.

As noted above, the Act affords an exception to its general provision that the public agency must compensate its employees with cash for overtime work unless an agreement for compensatory time has been reached. *See* 29 U.S.C.A. § 207(o)(2)(B). For "employees not covered by subclause (i)," 29 U.S.C.A. § 207(o)(2)(A)(ii), who were "hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii)," 29 U.S.C.A. § 207(o)(2)(B). Thus, in the absence of an agreement under subsection 7(o)(2)(A)(i), with regard to employees hired prior to April 15, 1986, the regular practice with respect to overtime compensation in effect on that date is deemed to be an agreement under subsection 7(o)(2)(A)(ii).

Turning to the present controversy, it is undisputed that no agreement was reached between the City and the Fire Fighters or their representative and that the Fire Fighters were hired prior to April 15, 1986.[1] Additionally, it is clear that the regular practice in effect on

[1] After April 15, 1986, the City has required all new employees to read and sign a statement acceding to its policy of granting compensatory time instead of cash for overtime.

that date was for the City to award and the employees to accept compensatory time in lieu of cash payment for overtime work. While Wilson's letter to Chief Blackwelder may have expressed the employees' dissatisfaction with the practice, it did not negate the existence of the regular practice, one that continued after the letter was written. We conclude, therefore, that this regular practice "constitute[d] an agreement or understanding under such clause (A)(ii)." 29 U.S.C.A. § 207(o)(2)(B); *see also Dillard*, 885 F.2d at 1553.

III.

Noting that the letter from Wilson to Chief Blackwelder was written prior to April 15, 1986, the Fire Fighters contend that because a representative had been designated prior to this date the City may not unilaterally elect to continue the regular practice of providing compensatory time in lieu of cash. The Fire Fighters first suggest that *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990), is controlling and assert that it holds that if a public employer refuses to recognize the employees' designated representative the employer is required to allow each employee the choice of compensatory time or cash. Second, the Fire Fighters contend that a Department of Labor regulation precludes reliance by the City on the practice in place prior to April 15, 1986.

The Fire Fighters misread *Abbott*. In *Abbott*, as in this case, the city refused to entertain negotiations with the union representative on the basis that state law prohibited a public entity from engaging in collective bargaining. We held that subsection 7(o)(2)(A)(ii) permitted a public employer to offer its employees a choice between compensatory time or cash for overtime. 879 F.2d at 137. *Abbott*, however, does not mandate that when a subsection 7(o)(2)(A)(i) agreement is not reached, a subsection (ii) agreement with individual em-

ployees *must* be reached. Indeed, nothing in *Abbott*, or in section 7(o), can be read to require that the parties reach an agreement.

The Department of Labor regulation on which the Fire Fighters rely provides in part:

> No agreement or understanding is required with respect to employees hired prior to April 15, 1986, *who do not have a representative*, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

29 C.F.R. § 553.23(a)(1) (1991) (emphasis added). The Fire Fighters contend that because they had designated Local 660 as their representative prior to April 15, 1986, the City may not rely upon the regular practice in effect on that date. We assume, without deciding, that this regulation is a proper exercise of the Secretary's authority because on the facts presented by this appeal, the regulation does not mandate that the Fire Fighters prevail.[2]

In adopting this regulation, the Department of Labor acknowledged that public employers in some states would be prohibited from recognizing and negotiating with certain employee representatives. *See Dillard*, 885 F.2d at 1556. Consequently, the Department expressed its "intention that the question of whether employees have a representative . . . shall be determined in accordance

---

[2] Because we find that the Fire Fighters did not have a representative within the meaning of the regulation, we need not, indeed should not, resolve the hypothetical question of the proper interpretation of the regulations if they had had a representative. Similarly, our disposition of this question negates the necessity of considering whether the regulation constitutes a valid exercise of the authority of the Secretary. We, therefore, decline to express an opinion on these issues. Contrary to the suggestion of the concurring opinion, our decision to decline to resolve these issues is driven by a desire to adhere to our view of the proper scope of appellate review.

with State or local law and practices.'" *Abbott*, 879 F.2d at 136 (quoting 52 Fed. Reg. 2012, 2014-15 (Jan. 16, 1987)). Because Local 660 was not a representative whom the City could recognize consistently with state law, *see* N.C. Gen. Stat. § 95-98 (1989), the Fire Fighters did not have a representative within the meaning of the regulation and, therefore, are not assisted by 29 C.F.R. § 553.23(a)(1).[3] *See Dillard*, 885 F.2d at 1556.

IV.

In sum, in order to determine if the City properly continued to provide compensatory time off in lieu of monetary compensatory for the Fire Fighters, we are first called upon to decide whether the Fire Fighters have entered into an agreement with the City under either subsection (i) or (ii). No "collective bargaining agreement, memorandum of understanding, or any other agreement" was reached, nor have individual agreements with the employees been struck. However, because the Fire Fighters are not covered by subsection (i); because they were hired prior to April 15, 1986; and because the regular practice prior to that date was to award compensatory time for overtime work, that practice is deemed to constitute an agreement under subsection (ii). Consequently, by virtue of this statutorily imposed agreement, the City may continue to provide compensatory time for overtime work.

REVERSED AND REMANDED

---

[3] The Fire Fighters' reliance on other portions of 29 C.F.R. § 553.23 is similarly foreclosed because they did not have a representative within the meaning of the regulation.

LUTTIG, Circuit Judge, concurring in part and concurring in the judgment in part:

I join parts I, II, and IV of the court's opinion, but concur in only the result reached in part III.

I.

I agree with the holding of the court in part II of its opinion that, under section 7(o) of the Fair Labor Standards Act, 29 U.S.C. § 207(o), whether the City of Charlotte may provide the Fire Fighters compensatory time in lieu of cash payment for overtime hours worked depends *solely* upon whether there is an agreement that provides for compensatory time payments. *See Dillard* v. *Harris*, 885 F.2d 1549, 1554 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 210 (1990). The court properly refuses to rest its decision in part II on whether appellees have a designated representative to negotiate with the City over compensation or on whether state law prohibits collective bargaining. Whether there is an employee representative and whether state law prohibits collective bargaining are, under the statute and the court's holding today, simply irrelevant. Section 7(o) distinguishes only between employees covered by agreements and those not covered by agreements, not between represented and unrepresented employees. If there is an agreement of a kind specified in either subsection (2)(A)(i) or subsection (2)(A)(ii), compensatory time may be provided; if there is no such agreement, regardless of the reason, the public employer is forbidden to award compensatory time for overtime hours worked.

The Fire Fighters and the dissent argue that a public agency is required by subsection (2)(A)(i) to negotiate with an employee-chosen representative and that the agency is prohibited from negotiating individual agreements under subsection (2)(A)(ii) if a representative has been selected by the employees. *See Nevada Highway Patrol Ass'n* v. *Nevada*, 899 F.2d 1549, 1553 (9th Cir.

1990); *International Ass'n of Fire Fighters, Local 2203* v. *West Adams County Fire Protection Dist.*, 877 F.2d 814, 818-20 (10th Cir. 1989).[1] The majority again correctly declines to engraft onto subsection 2(A)(i) an affirmative requirement to negotiate in absence of congressional direction and rejects as unsupported by the statute's language the contention that individual agreements with employees are prohibited if the employees have selected a representative.

The dissent, notably, does not even contend that section 7(o) itself imposes a requirement that the public agency reach an agreement with a designated employee representative as a precondition to the award of compensatory time to represented employees; its only argument is that the legislative history and the Secretary of Labor's regulatory interpretation of the statute should be given dispositive weight because of what the dissent asserts is an ambiguity in the statute. The statute, however, is not at all ambiguous. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (holding that courts and agencies alike are bound to effect an unambiguous statute). The reference in subsection (2)(A)(ii) to "employees not covered by subclause (i)" can only be to employees who are not

[1] The dissent's interpretation of section 7(o) is irreconcilable with this court's decision in *Abbott* v. *City of Virginia Beach*, 879 F.2d 132, 135-36 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990). In *Abbott*, a municipal agency, without reaching an agreement with its employees' designated representative, offered its employees a choice of cash or compensatory time for overtime. We held that a public employer may "enter into individual overtime compensation agreements with individual employees where state law prohibits the agency from entering into agreements with employee representatives." 879 F.2d at 135. There is no principled distinction between this case and *Abbott*. If section 7(o) prohibits the award of compensatory time to represented employees absent an agreement between the agency and the representative, as the dissent contends, then compensatory time would not have been permissible under the facts in *Abbott*.

subjects of an agreement between their agency and their representative. It cannot grammatically (and does not logically) refer to employees who are unrepresented because the compound objects of the prepositional phrase "pursuant to" in subsection (i) are the forms of agreement enumerated therein. The subsection does not denominate a class of represented employees; it identifies certain agreements (in addition to those in subsection (ii)) that will satisfy the requirement in subsection (2)(A) that compensatory time be provided pursuant to an agreement.

The dissent searches in vain for ambiguity that would justify resort to the legislative history of setcion 7(o) and the Secretary of Labor's regulatory interpretation of the statute, because these are the only "authorities" that even arguably support its position that Congress intended to impose a requirement that a public agency either reach an agreement with an employee representative or forgo an award of compensatory time. We will never know whether, as the dissent concludes solely from the legislative history, Congress *intended* to impose this requirement. We do know, however, that the statute *did not* impose such a requirement. And in the absence of such a requirement in the statute, we are without authority to impose one. In a system of laws, we have no more authority to give effect to a provision that was intended but not enacted, than we have authority to give effect to a provision that was never intended. The majority recognizes this limitation on the judicial power in its interpretation of section 7(o) in part II, and I join this portion of its opinion.

II.

I cannot, however, join the majority's interpretation of the applicable Labor Department regulations in part III of its opinion. In part III, the majority holds that Local 660 is not a "representative" within the meaning

of 29 C.F.R. § 553.23 "because [it] was not a representative whom the City could recognize consistently with state law." Majority op at 10. The majority offers no support for this interpretation of the term "representative," and the regulation itself would appear to contradict such an interpretation. The regulation expressly states that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." 29 C.F.R. § 553.23(b)(1); *see also* H.R. Rep. No. 331, 99th Cong., 1st Sess. 20 (1985) [hereinafter House Report] ("[A] representative . . . need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees . . . ."). The majority's interpretation of the regulation also conflicts with its interpretation of section 7(o). The premise of the court's interpretation of section 553.23 is that if state law permitted collective bargaining by the City, the City would have to pay cash for overtime hours worked unless it reached an agreement with Local 660. *Cf. Dillard*, 885 F.2d at 1555-56. As noted, however, the majority holds in part II of its opinion that the *only* condition on the provision of compensatory time is that it be provided pursuant to one of the forms of agreement specified in subsections (2)(A)(i) or (ii). Because I believe that the majority incorrectly interprets section 553.23 and in doing so undermines its own interpretation of section 7(o), I concur only in the result reached in part III.

I agree with the Fire Fighters and the dissent that Local 660 is a "representative" for purposes of the statute and the regulation. In my view, North Carolina's prohibition against collective bargaining by public agencies, *see* N.C. Gen. Stat. § 95-98, has no bearing whatsoever on whether the local is a "representative" within the meaning of the regulation. *But see State of Nevada Employees' Ass'n, Inc.* v. *Bryan*, 916 F.2d 1384, 1388-90 (9th Cir. 1990); *Nevada Highway Patrol*, 899 F.2d at 1554; *Dillard*, 885 F.2d at 1555-56; *Abbott* v. *City of*

Virginia Beach, 879 F.2d 132, 135-36 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990). I would hold, however, that nothing in either the statute or the regulation requires that a public agency reach an agreement with an employee representative or precludes an agency from striking individual agreements with its employees where a representative has been designated.[2]

The majority in part interprets the term "representative" in the manner it does so as to avoid an interpretation that it mistakenly believes would dictate a result that would conflict with the statute—namely that the City would be required to reach an agreement for compensatory time with the Local or pay cash for overtime work. *See infra* at 17-18. Such a requirement would, indeed, conflict with the court's interpretation of the statute, under which subsections (2)(A)(i) and (ii) set forth alternative means by which a public agency may legally provide compensatory time. But contrary to the majority's assumption, it would not follow from the fact that Local 660 is a legitimate "representative" that the City would be required under the regulation either to reach an agreement with the Local or to pay its employees cash. Even if this were the consequences of the opposing interpretation, the better course would be simply to invalidate the regulation as inconsistent with the statute.

---

[2] The courts that have held otherwise have done so in reliance on the Department of Labor's stated "intention that the question of whether employees have a representative . . . shall be determined in accordance with State or local law and practices." 52 Fed. Reg. 2012, 2015 (Jan. 16, 1987), *quoted in Nevada Highway Patrol*, 899 F.2d at 1554; *Dillard*, 885 F.2d at 1556; *Abbott*, 879 F.2d at 136. This stated intention appears only in the preamble to the final rule codified at 29 C.F.R. part 553. I simply would not allow an interpretation of the regulation to be controlled by the preamble where the regulation affirmatively evidences an intent that the term "representative" not be defined by reference to state law and the preamble itself elsewhere recognizes that "collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative." 52 Fed. Reg. at 2015.

See Chevron, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

Section 553.23(a)(1) provides in relevant part that "[n]o agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had [in effect on that date] a regular practice" of granting compensatory time. The purpose of this portion of subsection (a)(1) is merely to define one class of employees to whom public agencies may award compensatory time without an express agreement or understanding. The negative inference from this language is that compensatory time may be awarded to all other employees only pursuant to an express agreement, as the statute by terms requires. Nothing in either the language or logic of this portion of the regulation suggests that if there *is* a representative, then there must be an agreement between the agency and the representative before compensatory time may be awarded. To the extent that the Fire Fighters' argument rests on this portion of the regulation, it should be rejected on this basis alone.

The Fire Fighters' principal contention, however, is not that subsection (a)(1) requires that an agency reach an agreement with a designated representative if it is to provide compensatory time to its employees, but rather that subsection (b)(1) imposes such a requirement. The majority rejects the Fire Fighters' argument based on this provision without discussion on the grounds that they do not have a representative within the meaning of the regulation. *See* majority op. at 10 n.3. Subsection (b)(1) provides that, "[w]here employees have a representative, the agreement or undertaking concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding

or other type of oral or written agreement." 29 C.F.R. § 553.23(b)(1). The Fire Fighters contend that this portion of the regulation affirmatively requires an agreement between the public agency and the representative. This is a plausible reading of the regulation. I would interpret this portion of the regulation, however, merely as an implementation of the statute's requirement that compensatory time be awarded pursuant to an agreement in one of the specified forms. The structure of section 553.23 strongly suggests, if not confirms, that this was the subsection's only purpose. I would not read the section to impose an affirmative negotiation requirement where none exists in the statute itself. If I concluded that the Fire Fighters' interpretation were the only plausible interpretation of the regulation, however, I would invalidate the regulation as contrary to the statute.[3]

I suspect that fundamentally, the majority strains to interpret the regulation in the way that it does so as to preserve this court's decision in *Abbott*. *Abbott* proceeds from the same erroneous premise as the majority's interpretation of the regulation in this case. *Compare Abbott*, 879 F.2d at 135 ("The question here is whether section 207(o) permits public employers to enter into individual agreements with its employees . . . where state law prohibits the employer from entering into agreements with

---

[3] The majority mistakenly assumes that the foregoing analysis of the regulation is directed to a "hypothetical" issue not now before the court—namely, whether a public agency would be required to reach an agreement with an employee representative if that representative were recognizable under state law. *See* majority op. at 9 n.2. It is not. It is directed to the majority's interpretation of the regulation in this case. In my view, that interpretation conflicts with the majority's interpretation of the statute. Given his conflict, it is not an option as a matter of proper appellate review to refuse, as the majority does, to consider the Secretary's authority to promulgate the regulation but to reverse the district court. *See id.* The question, therefore, is not whether appellate review is proper, but whether there has been "proper" appellate review. *Id.*

employee representatives.") *with* majority op. at 10 ("Because Local 660 was not a representative whom the City could recognize consistently with state law . . . the Fire Fighters did not have a representative within the meaning of the regulation . . . ."). It may well be that the majority's interpretation of the statute is in tension, if not directly at odds, with this court's reasoning in *Abbott*. I would abandon *Abbott*'s rationale, however, before I would impose through the regulation a requirement that nowhere exists in the statute.

Under the interpretation of the statute and the regulation that I would adopt, the court would not be required to read into the statute a requirement that the public agency agree with a representative selected by its employees, as the Fire Fighters and the dissent must do. Nor would it be required to force an interpretation of the regulation that is ultimately unsuccessful in harmonizing the regulation with the statute, as the majority does. Moreover, my interpretation would be uniform nationwide, without regard to the patchwork of state laws regarding collective bargaining by public employees that would otherwise condition rights under the Fair Labor Standards Act "upon the mere fortuity of geography." Dissenting op. at 23.

If the statute and regulation are read in the manner that I suggest they should be, they are consistent with each other, and they result in a scheme that reasonably implements Congress' objectives in amending the Fair Labor Standards Act. Subsection (2)(A) ensures that compensatory time is provided "only pursuant to" an agreement, and subsections (i) and (ii) in turn define the agreements pursuant to which compensatory time may be provided. Subsection (i) authorizes compensatory time pursuant to "a collective bargaining agreement," a "memorandum of understanding," *or*, significantly, "any other agreement" between the public agency and an em-

ployee representative. Thus, even if collective bargaining agreements between a union and a public agency are prohibited by state law, an agency and an employee representative may still agree to compensatory time under subsection (i) by entering into some "*other* agreement."

Subsection (ii) defines an alternative, permissible form of agreement. For "employees not covered by subclause (i)"—employees who have not entered into a "collective bargaining agreement," a "memorandum of understanding," or "any other agreement" with their employer through their representative—it permits the provision of compensatory time pursuant to "an agreement or understanding arrived at between the employer and employee before the performance of the work." Thus, if the employees have chosen a representative and the agency does not reach an agreement with that representative for any reason, the agency may enter into individual agreements under subsection (ii) with any employee who wishes. The City's "regular practice" of awarding compensatory time prior to April 15, 1986, for example, constitutes such an individual agreement.

The statute and regulation, so read, also maximize the means available to public agencies and their employees to reach agreements providing for compensatory time, consistent with congressional intent. The one indisputable purpose for Congress' enactment of section 7(o) was to free up public funds by encouraging and facilitating compensatory time awards in lieu of cash payment for overtime hours worked. *See* House Report, *supra*, at 19. The dissent's interpretation of the statute and the regulation would completely frustrate this purpose, and the majority's interpretation of the regulation promises to do the same.

ERVIN, Chief Judge, dissenting:

I respectfully dissent.

I cannot agree with the conclusion reached by the majority in interpreting section 207(o). The majority's position has the inequitable result of resting the rights of public employees under the federal law that purports to protect them, the Fair Labor Standards Act ("the Act"), on the idiosyncracies of state legislatures. Under the majority's view, public employees in states like North Carolina, which prohibit public agencies from engaging in collective bargaining, have fewer rights than those in states that do not have similar prohibitions. I do not think that Congress intended for the protections afforded by the Act to hinge upon the accident of the state in which the employee happens to reside. I also do not think that Congress intended to allow a public employer to force an individual employee to accept compensatory time instead of cash for overtime worked as a condition of taking the job when the employees have designated a representative to ~~negotiate~~ jointly for them. Such an "agreement" is nothing of the sort; it is in reality a unilateral decision by the employer without employee consultation. If the public agency cannot or will not, for whatever reason, deal with the representative chosen by the employees, then it simply loses its right to use compensatory time in lieu of cash under the terms of the Act.

The majority reaches its result by making an ambiguous statute clear through judicial fiat. As the Tenth Circuit recognized, section 207(o) is ambiguous. *See International Ass'n of Firefighters, Local 2203 v. West Adams County Fire Protection Dist.*, 877 F.2d 814, 816-17 & n.1 (10th Cir. 1989). The majority assumes that if a public agency does not enter into an agreement with the representative of its employees to provide compensatory time instead of paid overtime pursuant to subsection 207(o)(2)(A)(i), it may enter into such an agreement with its individual employees pursuant to subsection 207

(o)(2)(A)(ii). Maj. op. at 7. Without discussion, the majority reads subsection (ii), which encompasses "employees not covered by subclause (i)," to refer unambiguously to employees whose representative has not reached an *agreement* with the agency, rather than, as is equally plausible, to employees who have not designated a *representative* to reach an agreement with the agency.

Answering the question of whether "employees not covered by subclause (i)" refers to those who lack an agreement or those who lack a representative disposes of this case. If the phrase refers to the lack of an agreement, as the majority assumes, the fact that the Fire Fighters did not reach an agreement with the City before April 15, 1986 means that the City's regular practice of giving only compensatory time constitutes a valid agreement with those employees pursuant to subsection (ii), and the lack of a subsequent agreement means that the City may force individual employees hired after that date to agree to the same policy as a condition of employment. If the phrase refers to the lack of a representative, however, the fact that the Fire Fighters have designated a representative, Local 660, means that the City can only award compensatory time by reaching an agreement with this representative pursuant to subsection (i). The language of this poorly drafted statute simply does not indicate which reading is the correct one.

We must therefore look to other sources to determine the proper construction of section 207(o)(2). The Secretary of Labor ("the Secretary") has promulgated a regulation interpreting this section. *See* 29 C.F.R. §§ 553.20-553.28 (1991). Because the statute is ambiguous on the issue, we are bound to accept the Secretary's interpretation if it is "based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). It matters not if the Secretary's construction was not the only permissible one or even if we would have reached a contrary interpretation had we had considered the matter *de novo*.

Id. at 843 n.11. In either case, the Secretary's interpretation controls.

In relevant part, the regulation provides:

> (a) **General.** (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime compensation only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, *who do not have a representative*, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.
>
> . . . .
>
> (b) **Agreement or understanding between the public agency and a representative of the employees.** (1) *Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency* either through a collective bargaining agreement or through a memoradum of understanding or other type of oral or written agreement. *In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.*
>
> . . . .

> (c) **Agreement or understanding between the public agency and individual employees.** (1) Where employees of a public agency *do not have a recognized or otherwise designated representative*, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must be reached prior to the performance of work.

29 C.F.R. § 553.23 (1991) (emphasis added).

This regulation's meaning is plain in two important respects. First, if the employees have selected a representative, an employer may use compensatory time only pursuant to an agreement between the employer and the representative. The concurring opinion in this case concedes that this is "a plausible reading of the regulation," but suggests an alternative interpretation and states that, if its alternative reading were not available, it would invalidate the regulation as contrary to the statute. Conc. op. at 15. I submit that this reading *is* the only logical way to interpret the regulation, and the regulation read this way is not contrary to the statute because it is consistent with one of the two equally possible readings of the statute.

The regulation must control if it is reasonable. *Chevron*, *supra*. The legislative history clearly supports the Secretary's construction of the statute. *See* S. Rep. No. 159, 99th Cong., 1st Sess. 10-11 (1985), *reprinted in* 1985 U.S.C.C.A.N. 658-59 ["Senate Report"] ("Where employees have a recognized representative, the agreement or understanding must be between that representative and the employer," employer's regular practice may constitute an agreement in the case of employees who have no representative); H.R. Rep. No. 331, 99th Cong., 1st Sess. 20-21 (1985), *reprinted in* 13656 U.S. Cong. Serial Set (Oct. 24, 1985) ["House Report"] ("Where employees have selected a representative, . . . the agreement or understanding must be between the representative

and the employer," regular practice constitutes agreement where employees lack representative). Therefore, the Secretary's position that if employes are represented, an employer can only use compensatory time if it reaches an agreement with the representative is reasonable and we are bound by it. *See Local 2203*, 877 F.2d at 819; *Nevada Highway Patrol Ass'n v. Nevada*, 899 F.2d 1549, 1553 (9th Cir. 1990).

Second, the regulation states that employees are deemed to be represented under section 207(o)(2) if they merely designate a representative; the representative need not be recognized by the employer. This means that a state law that prevents an agency from recognizing a public employee union does not preclude the employees from designating a representative for purposes of this section. Again, if reasonable, the Secretary's reading of the provision must control. Congress' choice of words clearly supports this reading. If, as the majority holds, Congress intended that public employees could not designate a representative in states that did not allow collective bargaining, Congress need have gone no further than say that the agreement must be part of a collective bargaining agreement. Instead, the statute states that the agency may provide compensatory time pursuant to "applicable provisions of a collective bargaining agreement, *memorandum of understanding, or any other agreement* between the public agency and representatives of such employees." 29 U.S.C. § 207(o)(2)(A)(i) (emphasis added). The fact that Congress included the possibility of agreement being in some other form indicates that this agreement could be reached in states like North Carolina that do not allow public collective bargaining.

The legislative history also provides ambiguous but sufficient support for the proposition that the representative need only be designated, not recognized; the House Report supports the view and the Senate Report does not. *Compare* House Report at 20, *reprinted* in 13656 U.S. Cong. Serial Set ("Where employees have *selected* a

representative, which *need not be a formal or recognized collective bargaining agent* as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer . . . .") *with* Senate Report at 10-11; *reprinted in* 1985 U.S.C.C.A.N. 658-59 ("Where employees have a *recognized* representative, the agreement or understanding must be between the representative and the employer," an employer may use compensatory time pursuant to a regular practice "[i]n the case of employees who have no *recognized* representative") (emphasis added). Unfortunately, the report of the Joint Committee on Conference fails to address these differing views. *See* H.R. Conf. Rep. No. 357, 99th Cong., 1st Sess. 7-10 (1985), *reprinted in* 1985 U.S.C.C.A.N. 668-71. However, the Senate receded and accepted the House version of the legislation in the Joint Committee on Conference. *Id.* Thus the House's view supportive of the Secretary should be given more weight than the Senate's view, although even one branch's support would be sufficient to find the Secretary's interpretation reasonable. As the concurring opinion notes, the majority's reliance on an isolated statement in the preamble to the Secretary's final regulation, which was later codified at 29 C.F.R. Part 553, that was contradicted elsewhere in the preamble and in the final regulation itself, cannot require state law to control whether employees have a "representative" under the statute. *See* conc. op. at 14 n.2; 52 Fed. Reg. 2012, 2015 (Jan. 16, 1987). Therefore, the Secretary's interpretation that the representative need only be designated, not recognized, is eminently reasonable and should control this case. *See Local 2203*, 877 F.2d at 820. *But see Nevada Highway Patrol*, 899 F.2d at 1554; *Dillard v. Harris*, 885 F.2d 1549, 1554 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 210 (1990).

The concurring opinion persuasively refutes the majority's formalistic view that the Fire Fighters have no "representative" under section 207(o) because North

Carolina law does not allow the City to recognize one. The concurring opinion goes wrong, in my view, just as the majority does, by forcing one plausible reading of the statute on language that equally supports two such readings and by ignoring the plain import of the Secretary's interpretation of the statute. The Supreme Court has told us in unmistakable terms that we should not substitute our views for that of the agency when the statute is ambiguous, but the majority has done just that. *See Chevron*, 467 U.S. at 865-66.

The practical result of the majority's decision is that the City can refuse to bargain with the employees' representative with the excuse that state law requires this result, thus unilaterally eviscerating the employees' choice in the matter and effectively circumventing the requirements of the Fair Labor Standards Act. According to the majority, employees who reside in states that prohibit public agencies from engaging in collective bargaining have fewer rights under federal law than their counterparts who live in states with no such prohibition. I do not believe that Congress intended for employees' rights under the Act to hinge upon the mere fortuity of geography.

As a panel of this court has previously stated, Congress intended to give employees an element of choice with respect to overtime pay in enacting section 207(o), in addition to providing the state and local governments flexibility in how to pay for overtime work. *Abbott v. Virginia Beach*, 879 F.2d 132, 136-37 (4th Cir. 1989) (quoting House Report at 19), *cert. denied*, 493 U.S. 1051 (1990). The Charlotte Fire Fighters have had no real choice in this matter—those hired before April 15, 1986 must abide by the previous City-imposed practice of compensatory time, and those hired later must agree individually, under highly coercive circumstances where they lack real bargaining leverage, to accept compensatory time as the price for accepting the job. I cannot

believe that Congress intended such a result. Because the City of Charlotte retains the *sole* discretion to award compensatory time instead of cash under the majority's analysis, I agree with the district court that the Act does not permit the City to take advantage of the compensatory time option without entering into an agreement with the employees' designated representative.

For these reasons, I would affirm the district court's decision below.

I am authorized to say that Judge Hall, Judge Phillips, Judge Murnaghan and Judge Sprouse join in this dissent.